UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

In Re: Highland Capital Management, L.P.	§	Case No. **19-34054-SGJ-11**
The Charitable DAF Fund LP	§	
Appellant	§	22-03052
vs.	§	
Highland Capital Management, L.P.	§	
Appellee	§	**3:22-CV-02280-S**

[43] Order granting amended motion to dismiss adversary proceeding with prejudice (related document # 19) Entered on 9/30/2022

APPELLANT RECORD
VOLUME 14

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
	§	
THE CHARITABLE DAF FUND, L.P.	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
vs.	§	22-03052-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Defendant.	§	
	§	INDEX

APPELLANT'S SECOND AMENDED STATEMENT OF ISSUES AND DESIGNATION OF RECORD ON APPEAL

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. ("Appellant") hereby designates the following items to be included in the record and identifies the following issues with respect to its appeal of the Order Granting Defendant's Amended Motion to Dismiss Adversary Proceeding [Doc.43] which

was entered by the United States Bankruptcy Court for the Northern District of Texas on September 30, 2022.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

Whether the Bankruptcy Court erred in granting Defendant's Amended Motion to Dismiss Adversary Proceeding.

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1

000001 1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 46].

000004 2. The judgment, order, or decree appealed from: Order Granting Amended Motion to Dismiss Adversary Proceeding [Doc. 43].

3. Any opinion, findings of fact and conclusions of law of the bankruptcy court relating to the issues on appeal, including transcripts of all oral rulings: None.

000032 3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 22-03052-sgj.

Vol. 2

No.	Date Filed	Docket No.	Description/Document Text
1	5/25/22 (7/22/21)	1	(18 pgs; 4 docs) Adversary case 22-03052. ORDER REFERRING CASE 3:21-CV-1710-N from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division and Complaint by Charitable DAF Fund, LP against Highland Capital Management, L.P. Fee Amount $350 (Attachments: # 1 Original Complaint # 2 Civil Cover Sheet # 3 Docket Sheet from 21-CV-1710). Nature(s) of suit: 02 (Other (e.g., other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, Marcey)
2	5/25/22 (10/5/21)	8	(8 pgs; 2 docs) MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) filed by Highland Capital Management LP (Attachments: # 1 Exhibit A) Attorney Zachery Z. Annable added to party Highland Capital Management LP(pty: dft) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #8 ON

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Vol. 2				10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
000066	3	5/25/22 (10/5/21)	9	(15 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re 8 MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #9 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
000081 Thru Vol. 6	4	5/25/22 (10/5/21)	10	(1012 pgs; 28 docs) Appendix in Support filed by Highland Capital Management LP re 8 MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14 # 15 Exhibit 15 # 16 Exhibit 16 # 17 Exhibit 17 # 18 Exhibit 18 # 19 Exhibit 19 # 20 Exhibit 20 # 21 Exhibit 21 # 22 Exhibit 22 # 23 Exhibit 23 # 24 Exhibit 24 # 25 Exhibit 25 # 26 Exhibit 26 # 27 Exhibit 27) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #10 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION](Okafor, Marcey)
Vol. 7 001093	5	5/25/22 (10/5/21)	11	(8 pgs; 2 docs) MOTION to Dismiss (Highland Capital Management, L.P.'s Motion to Dismiss) filed by Highland Capital Management LP (Attachments: # 1 Exhibit A) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #11 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
001101	6	5/25/22 (10/5/21)	12	(10 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re 11 MOTION to Dismiss (Highland Capital Management, L.P.'s Motion to Dismiss) (Annable, Zachery [ORIGINALLY FILED IN 21-CV-1710 AS #12 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
001111	7	5/25/22 (10/5/21)	13	((238 pgs; 4 docs) Appendix in Support filed by Highland Capital Management LP re 11 MOTION to Dismiss (Highland Capital Management, L.P.'s Motion to Dismiss) (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710

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			AS #13 ON 10/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
8 001349	5/25/22 (10/27/21)	15	(3 pgs) RESPONSE filed by Charitable DAF Fund LP re: 8 MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) (Sbaiti, Mazin) [ORIGINALLY FILED IN 21-CV-1710 AS #15 ON 10/27/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
9 001352	5/25/22 (11/5/21)	16	(7 pgs) REPLY filed by Highland Capital Management LP re: 8 MOTION for Reconsideration re 7 Order on Motion to Stay (Highland Capital Management, L.P.'s Motion for Reconsideration of Stay Order) (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-1710 AS #16 ON 11/05/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, Marcey)
10 001359	5/25/22 (11/21/21)	18	(2 pgs) ORDER re: 8 Motion for Reconsideration. The Court grants Defendant's motion, lifts the stay, and refers this case to Judge Stacey G.C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, to be adjudicated as a matter related to the Chapter 11 Bankruptcy of HCM., Chapter 11 Case No. 10-34054. The Clerk of this Court and the Clerk of the Bankruptcy Court to which this case is referred are directed to take such actions as are necessary to docket this matter as an Adversary Proceeding associated with the aforementioned consolidated bankruptcy case. (Ordered by Judge David C Godbey on 5/19/2022) (oyh) (Main Document 18 replaced on 5/23/2022) (twd). (Entered: 05/20/2022) [ORIGINALLY FILED IN 21-CV-1710 AS #18 ON 11/21/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (*ERROR IN ENTRY: CORRECT CASE NUMBER IS: 19-34054*) (Okafor, Marcey)
11 001361	5/27/22	19	(8 pgs; 2 docs) Amended Motion to dismiss adversary proceeding (related document(s):11) filed by Defendant Highland Capital Management, L.P. (Attachments:# 1 Exhibit A--Proposed Order) (Annable, Zachery)
12 001369	5/27/22	20	(12 pgs) Brief in support filed by Defendant Highland Capital Management, L.P. (RE: related document(s)19 Amended Motion to dismiss adversary proceeding (related document(s):11)). (Annable, Zachery)
13 001381	5/27/22	21	(637 pgs) Support/supplemental document *(Appendix in Support of Highland Capital Management, L.P.'s Amended*

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				Motion to Dismiss) filed by Defendant Highland Capital Management, L.P. (RE: related document(s)19 Amended Motion to dismiss adversary proceeding (related document(s):11)). (Annable, Zachery)
Vol. 11 002018	14	6/1/22	23	(6 pgs; 2 docs) Notice of hearing filed by Defendant Highland Capital Management, L.P. (RE: related document(s) 19 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, L.P.). Hearing to be held on 8/3/2022 at 02:30 PM at https://us courts.webex.com/meet/jerniga for 19 and for 19, (Attachments: # 1 Exhibit A)(Hayward, Melissa)
002024	15	7/5/22	30	(12 pgs) Response opposed to (related document(s): 19 Amended Motion to dismiss adversary proceeding (related document(s):11) filed by Defendant Highland Capital Management, L.P.) filed by Plaintiff Charitable DAF Fund, LP . (Ecker, C.) (Entered: 07/06/2022)
002036	16	7/26/22	31	(15 pgs) Reply to (related document(s): 30 Response filed by Plaintiff Charitable DAF Fund, LP) filed by Defendant Highland Capital Management, L.P.. (Annable, Zachery)
002051 Thru Vol 14	17	7/26/22	32	(865 pgs) Support/supplemental document *(Amended Appendix in Support of Highland Capital Management, L.P.'s Amended Motion to Dismiss)* filed by Defendant Highland Capital Management, L.P. (RE: related document(s) 21 Support/supplemental document). (Annable, Zachery)
Vol. 15 002916 Thru Vol. 18	18	8/1/22	34	(867 pgs; 23 docs) Witness and Exhibit List *(Reorganized Debtor's Witness and Exhibit List with Respect to Evidentiary Hearing to Be Held on August 3, 2022)* filed by Defendant Highland Capital Management, L.P. (RE: related document(s) 19 Amended Motion to dismiss adversary proceeding (related document(s):11)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14 # 15 Exhibit 15 # 16 Exhibit 16 # 17 Exhibit 17 # 18 Exhibit 18 # 19 Exhibit 19 # 20 Exhibit 20 # 21 Exhibit 21 # 22 Exhibit 22) (Annable, Zachery)
Vol. 19 003783 Thru Vol. 22	19	8/3/22	40	(1 pg) Court admitted exhibits date of hearing August 3, 2022 (RE: related document(s) 19 Amended Motion to dismiss adversary proceeding (related document(s):11) filed by Defendant Highland Capital Management, L.P. (Attachments: # 1 Exhibit A--Proposed Order)) COURT ADMITTED EXHIBIT 17. COURT TOOK JUDICIAL NOTICE OF EXHIBITS 1-13, 21 AND 22. (Ellison, T.) (Entered: 08/04/2022)

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20	9/30/22	42	(28 pgs) Memorandum of opinion regarding Defendant's amended motion to dismiss adversary proceeding (RE: related document(s)19 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, L.P.). Entered on 9/30/2022 (Okafor, Marcey)
21	8/4/22	41	41 Transcript regarding Hearing Held 08/03/2022 (45 pages) RE: Motion to Dismiss Adversary Proceeding (19). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 11/2/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Kathy Rehling, kathyrehlingtranscripts@gmail.com, Telephone number 972-786-3063. (RE: related document(s) 37 Hearing held on 8/3/2022. (RE: related document(s)19 Amended Motion to dismiss adversary proceeding (related document(s):11) filed by Defendant Highland Capital Management, L.P.) (Appearances: G. Demo and Z. Annabel for Movant/Highland; J. Bridges for Respondant/Charitable DAF. Evidentiary hearing. Motion granted. Court to issue Opinion and Order.)). Transcript to be made available to the public on 11/2/2022. (Rehling, Kathy)

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Dated: November 28, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 28th day of November, 2022.

/s/ Mazin A. Sbaiti
Mazin A. Sbaiti

trial by jury.

But the order does deprive trials by jury, first by asserting sole jurisdiction here, where jury trials are unavailable, and secondly, by abolishing any trial rights for claims that do not involve gross negligence or intentional misconduct.

Movants' third cause of action in the District Court case is for ordinary negligence. It comes with a Seventh Amendment jury right. But it's barred by the order because the order only allows colorable claims involving gross negligence or intentional conduct, not ordinary negligence.

Movants' second cause of action in the District Court case is for breach of contract. That comes with a Seventh Amendment jury right, but it's barred by the order because the order only allows colorable claims of gross negligence or intentional misconduct, not negligent or faultless breaches of contractual obligations.

Movants' first cause of action in the District Court case, breach of Advisers Act fiduciary duties, comes with a jury right. It's also barred by the order because the order only allows colorable claims involving gross negligence or intentional misconduct.

You see there what I mean. Congress couldn't have been clearer. Courts cannot deprive litigants of their day in court before a jury of their peers by invoking general equity

powers. Those powers don't trump the constitutional right to a jury trial.

Yet this Court's order purports to do precisely that, not only for the Movants, but also for future potential litigants who may have claims that have not even accrued yet. If those claims are for ordinary negligence or breach of contract or breach of fiduciary duties and don't rise to the level of gross negligence or intentional misconduct, this order says that those claims are barred, and it would deprive them of their day in court.

The Court's general equity powers are simply not broad enough to uphold such an order.

This issue is even more problematic when the causes of action at issue fall within the mandatory withdrawal of the reference provisions of 28 U.S.C. § 157(d). As this Court knows, it lacks jurisdiction over proceedings that require consideration of non-bankruptcy federal law regulating interstate commerce. Some such claims -- Movants' Advisers Act claim, for instance -- do not involve culpability rising to the level of gross negligence or intentional misconduct, but the order purports to bar them nonetheless, despite this Court's lacking jurisdiction over the subject matter of those claims.

Even if there is gross negligence or intentional misconduct, the order states that this Court will have sole

jurisdiction over such claims. And that can't be right if withdrawal of the reference is mandatory.

Opposing counsel will tell you that 157(d) is inapplicable here because they think our claims in the District Court won't require substantial consideration of the Advisers Act or any other federal laws regulating interstate commerce. But their cases don't come anywhere close to making that showing, as the briefing demonstrates.

And in any case, that argument is beside the point. This order is contrary to 157(d) because it asserts jurisdiction over claims that 157(d) does not apply -- I'm sorry, does apply to. And that's true regardless of whether Movants' claims are among those.

The idea that there's no substantial consideration of federal law, however, in the District Court case is undermined by Mr. Seery's testimony in support of his appointment in which he confirmed that the Advisers Act applies to him and that he has fiduciary duties under that Act to the investors of the funds he manages.

Your Honor, importantly, the Advisers Act isn't the typical federal statute with loads of case law under it. It's actually an underdeveloped, less-relied-upon statute, and most -- most of the law under that Act is promulgated by regulation and supervised by the SEC. As a registered investment advisor, Mr. Seery is bound by that Act, which he admits, he

agrees to. But to flesh out what his duties are requires a close exam of more than three dozen regulations under 17 C.F.R. Part 275.

The obligations include robust duties of transparency and disclosure, as well as duties against self-dealing and the necessity of obtaining informed consent, none of which are waivable, these duties.

The proceedings here in this Court reflect an effort to have those unwaivable duties waived. The allegations in the District Court are essentially insider trading allegations that the Debtor and Mr. Seery knew or should have known information that they had a duty under the Advisers Act to disclose to their advisees. Both under the Act and contractually, they had those duties. And, instead, they did not disclose and consummated a transaction that benefited themselves nonetheless.

In considering those claims, the presiding court will have to consider and apply the Advisers Act and the many regulations promulgated under it, in addition to other federal laws regulating interstate commerce. For that reason, withdrawal of the reference on the District Court action is mandatory. That's the two major -- that's two major problems out of four with the order that we're here on today.

First, it deprives litigants of their right to trial, to a jury trial, when Section 959(a) says that can't be done. And,

two, the order asserts jurisdiction -- sole jurisdiction, even -- over proceedings in which withdrawal of the reference is mandatory under 157(d).

The fourth major problem is what the Court called specificity at the previous hearing. The Fifth Circuit's *Applewood Chair* case holds that the rule from *Shoaf* does not apply without a "specific discharge or release," and that that release has to be enumerated and approved by the Bankruptcy Court. Thus, the order here can't exculpate Mr. Seery of liability for ordinary negligence and the like in a blanket fashion. The claims being released must be identified.

That's what happened in *Shoaf*. Shoaf's guaranty obligation was explicitly released. That's also what happened in *Espinosa*. Espinosa's plan listed his student loan as his only specific indebtedness. But it's not what happened here. And it couldn't happen here, because the ordinary negligence and similar claims being discharged by the order had not yet accrued and thus were not even in existence at the time the order issued.

Instead, what we have here is a nonconsensual, nondebtor injunction or release that's precisely what the Fifth Circuit refused to enforce in the *Pacific Lumber* case.

So, lack of specificity is the third major problem with the order. And that brings us to the fourth problem, which is the *Barton* doctrine. *Barton* is the only possible basis for

this Court to assert exclusive or sole jurisdiction over anything. Outside of *Barton*, it's plain black letter law that the District Court's jurisdiction is equal to and includes anything that this Court's derivative jurisdiction would also reach.

But the exception to the *Barton* doctrine in 959(a) plainly applies here, leaving no basis for exclusivity with regards to jurisdiction and the District Court. That's because Mr. Seery is carrying on the business of a debtor and managing the property of others, rather than merely administering the bankruptcy estate. The exclusive jurisdiction function of the *Barton* doctrine has no applicability because 959(a) creates that exception here.

Under its general equity powers, yes, 959(a) still authorizes this Court to exercise some control over actions against Mr. Seery, but short of depriving litigants of their day in court. And nothing in 959(a), that exception to *Barton*, says that the Court can nonetheless exercise exclusivity in that jurisdiction. Those general equity powers do not create exclusive or sole jurisdiction. They do not deprive the District Court of its Congressionally-granted original jurisdiction.

Moreover, Mr. Seery is not an appointed trustee entitled to the protections of the *Barton* doctrine in any case. His appointment was a corporate decision that the Court was asked

not to interfere with. The Court was asked to defer under the business judgment rule to the Debtor's appointment of Mr. Seery. And the Court did so.

As we asserted last time, no authority that we can find combines these two unrelated doctrines, the *Barton* doctrine and the business judgment rule. And they don't go together. None of the testimony or the briefing or argument, in the July order, in the January order that preceded it, none of that indicated that Mr. Seery would be a trustee or the functional equivalent of a trustee. The word "trustee" does not appear in any of those briefs or transcripts.

Opposing -- and because of that, the District Court suit is not about -- well, not because of that. The District Court suit simply is not about any trustee-like role that Mr. Seery may have played anyway. Opposing counsel will try to convince you otherwise, will tell you that the District Court case is a collateral attack on the settlement, but it's not. Wearing his estate administrator hat, Mr. Seery can settle claims in this court. Wearing his advisor hat, he has to fulfill his Advisers Act duties and properly advise his clients.

He doesn't have to wear both hats, and it seems highly unusual that he would choose to fill both of those roles simultaneously. But he has chosen both roles. And the District Court case is a hundred percent about his role as an advisor. Did he comply with the Act? Did he do the things

that his advisor role obligated him to do as a manager of that property?

The District Court suit really is only being used to illustrate the issues that we're raising here. It's important, it's timely to address those issues now because of the District Court action, but that's an illustration of the problems with the order. It is not exclusively that that action is what we're attempting to address. Rather, the order exculpating Mr. Seery from ordinary negligence liability and similar liability is problematic, is contrary to the law. On top of that, the Court is asserting jurisdiction over gross negligence and intentional misconduct claims. To the extent that 157(d) applies, it is problematic and contrary to law as well.

THE COURT: Okay. We're occasionally getting some breakup of your sound. So please -- I don't know what you can do to adjust, but it was just now, and intermittently we get a little bit of garbly. So if you could just say your last sentence one more time, and we'll see if it improves.

MR. BRIDGES: Your Honor, I'm not sure I can say this last sentence again.

THE COURT: Okay.

MR. BRIDGES: I was -- I was mentioning that the District Court case is an illustration of our argument. Our argument is not merely that the District Court case should be

exempted or excepted from the order. Our argument is that the order is legally infirm and that the District Court case and the claims there illustrate some of those infirmities, but that the infirmities go beyond just what's at issue in the District Court case.

In sum, there are four problems with the order that render parts of it legally infirm. It deprives the right of a jury trial -- in fact, of any trial -- in contravention of 959(a) for some causes of action.

It asserts jurisdiction -- two, it asserts jurisdiction over claims that are subject to the mandatory withdrawal of the reference provision (garbled) 157(d).

And three, it lacks the specificity required to discharge future claims under *Applewood*.

Finally, Your Honor, number four, the order relies on the *Barton* doctrine, which doesn't apply and which 959(a) creates an exception to.

Movants respectfully submit the order should be modified for those reasons.

MR. SBAITI: Tell him Mark Patrick is here, for the record.

THE COURT: All right. I have a couple of follow-up questions for you. I want to drill down on the issue of your client not having appealed the July 2020 order. Or the HarbourVest settlement order, for that matter. Tell me as

directly as possible why you don't view that as a big problem. Because it's high on my list of possible problems here.

MR. BRIDGES: I understand, Your Honor. The *Applewood Chair* case is our -- our defense to that argument, that without providing specifics as to the claims being discharged in the July order, that *Shoaf* cannot apply to create a res judicata effect from the failure to appeal that order.

THE COURT: But is that really what we're talking about, a discharge of certain claims? We're talking about a protocol that the Court established which wasn't appealed.

MR. BRIDGES: Your Honor, your order does many things. We're talking about a few of them in one paragraph of the order. And in that order -- in that paragraph, yes, it creates a protocol for determining the colorability of some claims, claims that rise to the level of gross negligence or intentional misconduct. It does not create a protocol for claims that fall below that threshold, claims for ordinary negligence, as an example.

THE COURT: Okay.

MR. BRIDGES: For breach of contract that's not intentional, is not grossly negligent, it's just a breach of contract. It can even be faultless. There's still liability. There's still a jury right under the Seventh Amendment for faultless breach of contract.

The protocols in the order do not address such claims other than to bar them. To discharge them. And thus, yes, it's a release, it's a discharge of those claims. It can be viewed as a permanent injunction against bringing such claims. It's what's -- it's what's not allowed by the *Applewood Chair* case and by *Pacific Lumber*.

THE COURT: All right. So you're arguing that was -- the wording of the order was not specific enough to apprise affected parties of what they were releasing, they're releasing claims based on ordinary negligence against Mr. Seery? That's not specific enough?

MR. BRIDGES: Correct. Future unproved claims, the factual basis for which has not happened yet. Those cannot be and were not disclosed with any specificity in this order.

If we compare it to *Shoaf* and to *Espinosa*, in *Shoaf* what we had was a guaranty, Shoaf's guaranty on a transaction that was listed in the actual release, describing what the transaction was that was being -- that the guaranty was being released for.

In *Espinosa*, what we had was a student loan --

THE COURT: Right.

MR. BRIDGES: -- that was listed in the plan specifically, as the only specific indebtedness.

Here, we don't have any of that specificity. What we have is a notice to the entire world, Your Honor, that for an

unlimited period of time any claim for ordinary negligence, for ordinary breach of contract or fiduciary duty against Mr. Seery is barred if it relates to his CEO role. And his CEO role means as a manager of property, exactly precisely what 959(a) is talking about.

Those jury rights (garbled) claims cannot be released, discharged, expunged, done away with, in an order that isn't explicit.

On top of that, even in an explicit order, 959(a) tells the Court it cannot deprive a litigant of its jury trial right.

THE COURT: Well, as anyone knows who's been around a while in this case, my brain sometimes goes down an unexpected trail, and maybe this one is one of those situations. Are there contracts that your clients would rely on in potential litigation?

MR. BRIDGES: Yes, Your Honor.

THE COURT: What are those contracts?

MR. BRIDGES: It is a management contract. I don't think I can give you the specifics at this moment, but I probably can before we're done here today. A management contract in which the Debtor provides advisory and management services to the DAF --

THE COURT: Well, you know, the shared services agreements that we heard so much about in this case? A shared

service agreement? I can't remember, you know, which entities have them and which do not at times. So, --

MR. BRIDGES: The shared services agreement is one of those contracts, Your Honor.

THE COURT: Okay.

MR. BRIDGES: It's not the only one.

THE COURT: And what are the others?

MR. BRIDGES: There's -- the other is the investment advisory agreement.

THE COURT: Those two?

MR. BRIDGES: (no response)

THE COURT: Those are the only two?

MR. BRIDGES: There may be one other, Your Honor. I'm not sure.

THE COURT: Are they in evidence?

MR. BRIDGES: I can find out shortly.

THE COURT: Are they in evidence? We haven't talked about evidence yet, but are they going to be in evidence, potentially?

MR. BRIDGES: They are referenced in the District Court case, the complaint, which is in evidence.

THE COURT: I'm asking, are --

MR. BRIDGES: But those contracts I don't believe are listed as exhibits here in this motion, no.

THE COURT: They are not? Okay.

Well, what my brain is thinking about here is, of the umpteen agreements I've seen -- more than umpteen -- of the many, many agreements I've seen over time in this case, so often there's a waiver of jury trial rights, as I recall, as well as an arbitration clause. I just was curious, hmm, you know, you talked a lot about your clients' jury trial rights: do we know that these agreements have not waived those?

MR. BRIDGES: Your Honor, I think I can answer that by the end of our hearing. I don't have an answer off the top of my head. What I can tell you is a jury right has been demanded in the federal court complaint, which is in evidence, and that opposing counsel has brought no evidence indicating that they have the defense of our having waived the right to a jury trial here.

THE COURT: Okay. Well, I just --

MR. BRIDGES: Or arbitra...

THE COURT: -- would think that you would know that. Does anyone know that on the Debtor's side off the top of your head?

MR. POMERANTZ: I do not, Your Honor.

THE COURT: Uh-huh.

MR. POMERANTZ: And to Mr. Bridges' last point, we have filed a motion to dismiss. We have not answered the complaint. So any time to object to their jury trial right would be in the context of the answer. So the implication

that we have not raised the issue and therefore it doesn't exist is just not a correct implication and connection he's trying to draw.

THE COURT: Okay. All right.

Well, let me also ask you about this. I'm obsessing a little over the *Barton* doctrine and your insistence that it does not provide authority or an analogy here.

Well, for one thing, is there anything in the Fifth Circuit case *Sherman v. Ondova* that you think either helps you or hurts you on that point? I'm intimately familiar with it, although I haven't read it in a while, because it was my opinion that the Fifth Circuit affirmed. And I spent a lot of time thinking about that. It was a trustee, a traditional -- well, no, a Chapter 11 trustee and his counsel. But anything from that case that you think is worthy of pointing out here?

MR. BRIDGES: No, Your Honor. I'm not -- nothing comes to mind. That case is not fresh on my mind.

What I would tell you is that *Barton* doctrine and the business judgment rule are incompatible, and the appointment of a trustee never involves application of the business judgment rule or deference to the Debtor or another party in terms of making that appointment.

The *Barton* doctrine, as it applies to trustees, is viewed as an extension, to some extent, of judicial immunity to the trustee, who is chosen by, selected by the Court and assigned

by the Court to carry out certain functions. That --

THE COURT: Well, let me --

MR. BRIDGES: -- quasi-immunity --

THE COURT: -- stop you there. You say it's an extension of immunity. But isn't it, by nature, really a gatekeeping provision? It's a gatekeeping provision, right? Before you even get to immunity, maybe, in a lawsuit, it's a gatekeeping function that the Supreme Court has blessed, you know, obviously in the context of a receiver, but appellate courts have blessed it in the bankruptcy context. The Bankruptcy Court can be the gatekeeper on whether the trustee or someone I think in a similar position can get sued or not.

And then we had that Fifth Circuit case after *Ondova*. It begins with a V, *Villegas* or something like that. Didn't that, I don't know, further ratify, if you will, the whole *Barton* doctrine by saying, oh, just because they're noncore claims, state law or non-bankruptcy law claims, doesn't mean, after *Stern*, the Bankruptcy Court still cannot serve the gatekeeper function.

Tell me what you disagree. That's my kind of combined reading of all of that.

MR. BRIDGES: Your Honor, I have to parse it out. There's a lot to unpack there. If I can make sure to get in the follow-ups, I can start with saying it's okay for the Court in many instances to act as a gatekeeper.

THE COURT: Okay.

MR. BRIDGES: Both under *Barton* -- under *Barton*, or when the *Barton* exception in 959(a) applies, under the Court's general equitable powers, that gatekeeping functions are not across-the-board prohibited, --

THE COURT: Okay.

MR. BRIDGES: -- and we aren't trying to argue that they're prohibited across the board.

THE COURT: Okay.

MR. BRIDGES: Now, to try to dig into that a little deeper, the order does two things: gatekeeping as to some claims, and, frankly, discharging or barring other claims. Those are two separate functions.

The first one, the gatekeeping, may be, in some circumstances, which we'll come to, many circumstances, may be allowable, may be even mandatory under *Barton*, not even requiring an order from this Court, for the gatekeeping of *Barton* to apply. But nonetheless, allowable in many instances under the Court's general equity powers under 959(a). That part is right about gatekeeping.

It does not create jurisdiction in this Court where 157(d) deprives this Court of jurisdiction. Just because it's related to bankruptcy isn't enough to say that the Court therefore has jurisdiction if, one, if mandatory withdrawal of the reference is required.

Furthermore, Your Honor, that gatekeeping function, under the equity powers authorized by 959(a), will not allow a court to discharge or -- or deprive, is the word I'm looking for -- deprive a litigant of their right to a trial -- a specific kind of trial, a jury trial -- but a trial. And by crafting an order that says certain kinds of claims that do (garbled) jury rights are barred, rather than just providing a gatekeeper provision, flat-out bars them, that doesn't -- that doesn't comply with 959.

THE COURT: Okay.

MR. BRIDGES: Your Honor, if I could add one last thing.

THE COURT: Go ahead.

MR. BRIDGES: The Supreme Court's *Stern* case points out that -- that it's -- well, actually, it's the *Villegas* case from the Fifth Circuit --

THE COURT: The one I mentioned.

MR. BRIDGES: -- points out that *Stern* -- *Stern* -- yes, you did. *Stern* did not create an exception to the *Barton* doctrine. And that gives -- that endorses a *Barton* court's ability to perform gatekeeping, even over claims that *Stern* says there would not be jurisdiction over.

Contrast that with 959(a), which *Collier on Bankruptcy* and the Fifth Circuit have held is an exception to the *Barton* doctrine. Because of that exception, *Barton* no longer

applies, and what you're using in invoking a gatekeeper order is the Court's inherent equitable powers, its general powers in equity. And those equity powers are cabined. They're broad, but they're cabined by 959(a)'s prohibition of doing away with a litigant's right to a trial, a jury trial.

Now, I also -- counsel is telling me I should note for the record that Mr. Mark Patrick is here as a representative of our clients. But Your Honor, I'll -- I will quit now unless you have further questions for me.

THE COURT: All right. I do not at this time. Mr. Morris or Mr. Pomerantz, who's going to make the argument?

MR. POMERANTZ: It's me, Your Honor.

OPENING STATEMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: And I'll start with the jury trial right. In the last few minutes, we have been able to determine that the Second Amended and Restated Investment Advisory Agreement between the DAF and the Debtor has a broad jury trial waiver under 14(f). And in addition, as I will include in my discussion, there is no private right of action under the Investment Advisers Act.

I think those two points are fatal to Movants' argument, and probably I can get away with not even responding to the others. But since I prepared a lengthy presentation to address the issues that were raised today, and also the half hour that Mr. Bridges spent with Your Honor on June 8th in

which was his first opening statement on the motion for reconsideration, I'll now proceed.

THE COURT: All right.

MR. POMERANTZ: The arguments that the Movants made in the original motion essentially boil down to one legal proposition, that the Court did not have jurisdiction to enter the July 16th order because those orders impermissibly stripped the District Court from jurisdiction, in violation of (inaudible) Supreme Court precedent and 28 U.S.C. Section 157(d).

As with all things Dondero, the arguments continue to morph, and you heard argument at the contempt hearing on June 8th and further argument today that now the prospective exculpation for negligence in the order is also unenforceable and should be modified.

Movants continue to try to distance themselves from the January 9th order and argue that it is not relevant because they seek to pursue claims against Mr. Seery as CEO and not as an independent director. Movants ignore, however, that the January 9th order not only protects Mr. Seery in his role as the independent director, but also as an agent of the board. I will walk the Court through my arguments on that issue in a few moments.

Of course, the Movants had no explanation, Your Honor, for the question of why it took them until May of 2021, 10 months

after the entry of the July 16th order that appointed Mr. Seery as CEO and CRO, and 16 months after the Court appointed the independent board, with Mr. Dondero's blessing and consent, as a substitute for what would have surely been the imminent appointment of a Chapter 11 trustee.

Movants try to distance themselves from the prior orders by essentially arguing that the DAF is a newcomer to the Chapter 11 and is not under Mr. Dondero's control but is rather managed separately and independently by Mr. Patrick, who recently replaced Mr. Scott.

The Movants admit, as they must, that the DAF is the parent and the sole shareholder of CLO Holdco and conducts its business through CLO Holdco, and both entities conduct their business through one individual. It was Grant Scott then; it's Mark Patrick now. So even if Mr. Dondero does not control the DAF and CLO Holdco, which issue was the subject of lengthy testimony in connection with the DAF hearing, both the DAF and the CLO Holdco are bound by the Debtor's res judicata argument, which I will discuss shortly.

In any event, I really doubt the Court is convinced that the DAF operates truly independently of Mr. Dondero any more than the Court has been convinced that the Advisors, the Funds, Dugaboy and Get Good, all operate independently from Mr. Dondero. The only explanation for the delay is that Mr. Dondero has been and continues to be unhappy with the Court's

rulings and has now hired a new set of lawyers in a desperate attempt to evade this Court's jurisdiction. Having failed in their attempt to recuse Your Honor from the case, this is essentially their last hope.

And these new lawyers, Your Honor, have not only filed this DAF lawsuit in the District Court which is the subject of the contempt motion and today's motion, but they also filed another lawsuit in the District Court on behalf of an entity called PCMG, another Dondero entity, challenging yet another of Mr. Seery's postpetition decisions.

And there's no doubt that this is only the beginning. Mr. Dondero recently told Your Honor at a hearing that there were many more sets of lawyers waiting in the wings. And as the Court remarked at the hearing on the Trusts' motion to compel compliance with Rule 2015.3, the Trusts were trying through that motion to obtain information about the Debtor's control entities so that they could file more lawsuits against the Debtor, a concern that Mr. Draper unconvincingly denied.

I would like to focus the Court preliminarily on exactly what the January 9th and July 16th orders do, because Movants try to confuse things by casting the entire order with a broad brush of their jurisdictional overreach arguments, and they misinterpret Supreme Court and Fifth Circuit precedent.

I would like to put up on the screen the language of Paragraph 10 of the January 9th order and Paragraph 35

(garbled) of the July 16th.

Your Honor is very familiar with these orders, I'm sure, having dealt with them in connection with confirmation and in prior proceedings. But to recap, the orders essentially do three things.

First, they require the parties to first come to the Bankruptcy Court before commencing or pursuing a claim against certain parties.

Second, they provided the Court with the sole jurisdiction to make a finding of whether the party has asserted a colorable claim of negligence -- of willful misconduct or gross negligence.

And lastly, the orders provided the Court with exclusive jurisdiction over any claims that the Court determined were colorable.

The protected parties under the January 9th order are the independent directors, their agents and advisors, which, as I mentioned earlier, includes Mr. Seery -- who, at least as of March 2020, was acting as the agent on the board's behalf as the CEO -- for any actions taken under their direction.

The protected parties under the July 16th order are Mr. Seery, as the CEO and CRO, and his agents and advisors.

Movants spend a lot of time in their moving papers and reply arguing that the Court may not assert exclusive jurisdiction over any claims that pass through the gate. They

also spend a lot of time arguing that the Bankruptcy Court does not even have jurisdiction at all to assert -- to adjudicate claims against Mr. Seery because such claims are subject to mandatory withdrawal under Section 157(d).

The Debtor doesn't agree, and has briefed why mandatory withdrawal of the reference is inapplicable. The Debtor has also filed in the District Court a motion to enforce the reference in effect in this district which refers cases in this district arising under, arising in, or related to Chapter 11 to the Bankruptcy Court.

The motion to enforce the reference, Your Honor, which extensively briefs this issue, is contained in Exhibit 3 of the Debtor's exhibits.

We were somewhat surprised that the complaint filed in the District Court wasn't automatically referred to this Court under the standing order in effect in this district, given the related bankruptcy case, the Court's prior approval of the HarbourVest settlement, and the appeal in the District Court of the HarbourVest settlement.

When we dug a little further, we found out that Movants filed a civil case cover sheet accompanying the complaint in the District Court. They neglected in that initial filing to point out that there was any related case to the lawsuit they filed.

Mr. Bridges fell on his sword at the contempt hearing on

June 8th and took complete responsibility for the oversight. I commend him for not trying to argue that the bankruptcy case, the HarbourVest settlement, and the District Court appeal are not related cases that would require disclosure, an argument that surely would have been unsupportable.

But as I said at the contempt hearing, I find it curious that such an important issue was overlooked, an issue which would have likely changed the entire trajectory of the proceedings and landed the DAF lawsuit in this Court rather than the District Court.

And this Tuesday, Your Honor, Movants filed a revised civil cover sheet with the District Court. Although they referenced the bankruptcy case as a related case, they didn't bother to mention the appeal already pending in the District Court regarding the HarbourVest settlement -- surely, a related case.

Your Honor also asked Mr. Bridges at the June 8th hearing whether it was an oversight or intentional that he didn't mention 28 U.S.C. Section 1334 as a basis for jurisdiction in his complaint. Mr. Bridges had no answer for Your Honor then, and has given no answer now. His only comment at the hearing last time was that it must have been Ms. Sbaiti that wrote it because he had no recollection of it.

So, Your Honor, it's no surprise that Movants conveniently found themselves in the District Court, which was their

ultimate strategy from the get go.

In any event, Your Honor, we have briefed the withdrawal of the reference issue. A response by the Movants is due -- CLO Holdco and DAF is due on June 29th. And we hope the District Court will decide soon thereafter whether to enforce the reference.

While I'm happy to argue why Movants' mandatory withdrawal of the reference argument is [not] persuasive, I don't think it's necessary, but I do, again, want to highlight that there is no private right of action under the Investment Advisers Act.

Your Honor, it's not really relevant to today's hearing, since we have argued in opposition to the motion before Your Honor that resolving the issue of the Bankruptcy Court's jurisdiction to adjudicate claims contained in the complaint as they relate to Mr. Seery is premature at this point. The January 9th and July 16th orders first require the Court to determine whether a claim is colorable. It's not until this Court determines if a claim is colorable that the decision on where the lawsuit should be tried is relevant.

Having said that, Your Honor, we read the Movants' reply brief very carefully and noticed in Footnote 6 that the Movants state that modifying the exclusive grant of jurisdiction to adjudicate any claims that pass through the gate to include the language "to the extent permissible by

law," in the same way the Debtor modified the plan, would resolve the motion. So let's look at the provision as it exists in the plans.

Ms. Canty, if you can put up the next demonstrative, please.

This provision provides that the Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable, and, only to the extent legally permissible and provided in Article XI, shall have jurisdiction to determine -- to adjudicate the underlying colorable claim or cause of action.

The Movants request in their reply brief in Footnote 6 that the July 16th order be given the plan treatment. That treatment: sole authority to determine colorability and jurisdiction, and, to the extent legally permissible, to adjudicate underlying claim, only if jurisdiction existed.

After reviewing the reply brief and prior to the June 8th hearing, we decided that we would agree to modify both the January 9th and the July 16th orders to provide that the Bankruptcy Court would only have jurisdiction to adjudicate claims that pass through the colorability gate to the extent permissible by law.

Prior to the June 8th hearing, Mr. Morris and I had a conversation with Mr. Bridges. We conferred about a potential resolution and a proposed modification. Mr. Bridges indicated

they were interested in exploring a resolution and wanted to --

MR. BRIDGES: Objection, Your Honor.

THE COURT: There's an objection?

MR. BRIDGES: Objection, Your Honor. There's a Rule 408 settlement discussion. He's welcome to talk about the results, but he shouldn't be talking about what was -- what was proposed by opposing counsel in a settlement conversation.

THE COURT: Okay. I overrule.

MR. POMERANTZ: Your Honor, this was not --

THE COURT: I don't think this is a 408 issue. Continue.

MR. BRIDGES: Thank you.

MR. POMERANTZ: The stipulation and order which we provided to counsel is attached to my declaration, which is found at Document 2418, and it was filed in connection with a Notice of Revised Proposed Orders that we filed at Docket 2417. And I would like to put up on the screen the relevant paragraphs of the order that we provided to the Movants.

So, you see, we agreed to modify each of the orders at the end to do what the plan says. The Court would only have jurisdiction for claims passing through the gate if the Court had jurisdiction and it was legally permissible.

Movants' counsel, however, responded with a mark-up that went beyond -- went beyond what Movants proposed in Footnote 6

and sought to fundamentally change the January 9th and July 16th orders in ways that were not acceptable to the Debtor and not even contemplated by the original motion.

Ms. Canty, can you put up on the screen the relevant paragraphs of the response we received?

Specifically, Your Honor, you see at the first part they wanted to provide that the only -- the order only applied to claims involving injury to the Debtor, presumably as opposed to alleged injuries to affiliated funds or third parties. They also provided that the Court's ability to make the initial colorability determination was also qualified by "to the extent permissible by law" in the way that the Court -- that the Debtor agreed to modify the ultimate adjudication jurisdiction provision.

Your Honor, Movants haven't even talked about this back and forth. They haven't talked about their about-face. And I'll leave it for Your Honor to read their Footnote 6 that said it would resolve their motion, the back and forth, our proposal, and now Mr. Bridges' modified, morphed arguments that now point out other issues.

In any event, Your Honor, we made the change, and we think it should resolve the motion, or at least it resolves part of the motion. There can't be any argument that the Court is trying to exert exclusive jurisdiction on claims that pass through the gate.

What apparently remains from the arguments raised by the Movants is the argument that the Court does not even have jurisdiction to act as a gatekeeper in the first place because it doesn't have jurisdiction of the underlying lawsuit. And on June 8th and today, they've added a new argument, that the orders impermissibly exculpate Mr. Seery and others, violate their jury trial rights, and are contrary to the Fifth Circuit precedent.

Movants claims that the orders are a jurisdictional overreach, a violation of constitutional proportions, a violation of due process, and inconsistent with several U.S. Supreme Court cases. But, of course, they cite no cases whose facts are even remotely similar to this one. Instead, they are content to rely on general statements regarding bankruptcy jurisdiction, how it is derived from district court jurisdiction and is constitutionally limited, legal propositions which are not terribly controversial or even applicable to these facts.

There are several arguments -- I mean, there are several reasons, Your Honor, why Movants' arguments fail. Initially, Movants have not cited any authority, any statute, or any rule which would allow this Court to revisit the January 9th and July 16th orders. As I will discuss in a moment, Your Honor, *Republic v. Shoaf*, a case the Court is very familiar in and relied on in connection with plan confirmation, bars a

collateral attack on these orders under the doctrine of res judicata.

Similarly, as the Court remarked on June 8th, the Supreme Court's *Espinosa* decision, which rejected an attack based upon Federal Rule of Civil Procedure 60(b)(4) to a prior order that may have been unlawful, prohibits the Court from now reconsidering the January 9th and July 16th orders.

But even if Your Honor rules that res judicata does not apply, there are two independent reasons why the orders were not an unlawful extension of the Court's jurisdiction. The first is because the Court had jurisdiction to enter both of those orders as the ability to determine the colorability of claims is within the jurisdiction of the Court. The second is because the orders are justified by the *Barton* doctrine.

Lastly, Your Honor, Movants' argument that the Court may not act as a gatekeeper to determine the colorability of a claim for which it may not have jurisdiction is incorrect, and as Your Honor has mentioned and as Mr. Bridges unconvincingly tried to distinguish, the Fifth Circuit *Villegas v. Schmidt* case is a case on point and resolves that issue.

Turning to res judicata, Your Honor, it prevents the Court from revisiting these governance orders. CLO Holdco had formal notice of the Seery CEO motion and the opportunity to respond. It failed to do so. It is clearly bound.

As reflected on Debtor's Exhibit 4, CLO Holdco is a

wholly-owned subsidiary of the DAF. The DAF is its sole shareholder. There is no dispute about that. Importantly, at the time of both the January and July orders, Grant Scott was the only human being authorized to act on behalf of CLO Holdco and the DAF. The DAF did not respond to the Seery CEO motion, either.

And why is that important, Your Honor? It's because Movants argue in their reply that the DAF cannot be bound by res judicata because they did not receive notice of the July 16th order. However, Your Honor, that is not the law. Res judicata binds parties to the dispute and their privies, and the DAF is bound to the prior orders even though it did not receive notice.

There are several cases, Your Honor, that stand for this unremarkable proposition. First I would point Your Honor to the Fifth Circuit's opinion of *Astron Industrial Associates v. Chrysler*, found at 405 F.2d 958, a Fifth Circuit case from 1968. In that case, Your Honor, the Fifth Circuit held that the appellant was barred by the doctrine of res judicata from bringing a claim because its parent, which was its sole shareholder, would have been bound by res judicata.

Astron is consistent with the 1978 Fifth Circuit case of *Pollard v. Cockrell*, 578 F.2d 1002 (1978). And the Northern District of Texas in 2000 case of *Bank One v. Capital Associates*, 2000 U.S. Dist. LEXIS 11652, found that a parent

and a sole shareholder of an entity couldn't assert res judicata as a defense when those claims could have been brought against its wholly-owned subsidiary.

And lastly, Your Honor, the 2011 Southern District of Texas case, *West v. WRH Energy Partners*, 2011 LEXIS 5183, held that res judicata applied with respect to a partnership's general partner because the general partner was in privity with the partnership.

These cases are spot on and make sense. DAF is CLO Holdco's parent. Grant Scott was the only live person to represent these entities in any capacity at the relevant times. Accordingly, just as CLO Holdco is bound, DAF is bound.

Allowing DAF to assert a claim when its wholly-owned and controlled subsidiary is barred would allow entities to transfer claims amongst their related entities in order to relitigate them and they would never be finality. And, of course, Jim Dondero, as we know, consented to the January 9th order, which provided Mr. Seery protection in a variety of capacities.

And as Your Honor has pointed out, and as Mr. Bridges didn't have an answer for, neither CLO Holdco nor the DAF or any other party appealed any of the governance orders. And nobody challenged the validity of these orders at the confirmation hearing, where the terms of these orders were

front and center.

And importantly, Your Honor, the orders are clear and unambiguous. They require a Bankruptcy Court [sic] to seek Bankruptcy Court approval before they commence or pursue an action against the independent board, the CEO, CRO, or their agents. And they clearly and unambiguously set the standard of care for actions prospectively: gross negligence or willful misconduct.

The Bankruptcy Court had jurisdiction to enter the governance orders, which, as expressly indicated in the orders, were core proceedings dealing with the administration of the estate. No one challenged this finding of core jurisdiction. And as I will discuss later, the failure to challenge core jurisdiction is waived under applicable Supreme Court and Fifth Circuit precedent.

Your Honor, the Court [sic] does not argue that Movants have waived their right to seek adjudication of a lawsuit that passes through the colorability gate by an Article III Court. The issue is not before the Court, but the changes to the order that the Debtor agreed to make clearly -- clearly will provide Mr. Bridges' clients the ability to make that determination.

The Debtor is, however, arguing that the Movants have waived their right to contest the core jurisdiction of the Bankruptcy Court to make the determination that the claims are

colorable in the first place, and to challenge the exculpation provisions provided to the beneficiaries of those orders.

Accordingly, Your Honor, the elements of res judicata are satisfied. Both proceedings involve the same parties. The prior judgment was entered by a court of competent jurisdiction. The prior order was a final judgment on its merits. And they involved the same causes of action.

Importantly, the members of the independent board, including Jim Seery, relied on the protections contained in the January 9th and July 16th orders and would not have accepted these appointments if the protections weren't included. And how do we know this? Because each of them, both Mr. Seery and Mr. Dubel, both testified at the confirmation hearing on this very topic.

And I would like to put up on the screen an excerpt from Mr. Seery's testimony at confirmation, which is testimony included in the February 2nd, 2021 transcript, which is Exhibit 2 of the Debtor's exhibits.

THE COURT: Okay.

MR. POMERANTZ: And I would like to just read this, Your Honor.

"Q Okay. You mentioned that there were certain provisions of the January 9th order that were important to you and the other independent directors. Do I have that right?"

MR. POMERANTZ: A little bit later on, Mr. Seery testifies:

"A And then ultimately there'll be another provision in the agreement here, I don't see it off the top of my head, but a gatekeeper provision. And that provision" --

"Q Hold on one second, Mr. Seery."

MR. POMERANTZ: Please scroll.

"Q So, Paragraph 4 and 5, were those -- were those -- were those provisions put in there at the insistence of the prospective independent directors?

"A Yes.

"Q Okay. Can we go to Paragraph 10, please? There you go."

Mr. Morris: Is this the other provision that you were referring to?

"A This is -- it's become to be known as the gatekeeper provision, but it's a provision that I actually got from other cases -- again, another very litigious case -- that I thought it was appropriate to bring it into this case. And the concept here is that when you are dealing with parties that seem to be willing to engage in decade-long litigation and multiple forums, not only domestically but even throughout the world, it seemed important and prudent

to me and a requirement that I set out that somebody would have to come to this Court, the Court with jurisdiction over these matters, and determine whether there was a colorable claim. And that colorable claim would have to show gross negligence and willful misconduct -- i.e., something that would not otherwise be indemnifiable" --

MR. POMERANTZ: Hold on one second.

"A So, basically, it set an exculpation standard for negligence. It exculpates the directors from negligence, and if somebody wants to bring a cause against the directors, they have to come to this Court first to get a finding that there's a colorable claim for gross negligence or willful misconduct."

"Q Would you have accepted the engagement as an independent director without the Paragraphs 4, 5, and 10 that we just looked at?

"A No, these were very specific requests. The language here has been smithed, to be sure, but I provided the original language for Paragraph 10 and insisted on the guaranty provisions above to ensure that the indemnity would have some support.

"Q And ultimately did the Committee and the Debtor agree to provide all the protections afforded by Paragraphs 4, 5, and 10?

"A Yes."

MR. POMERANTZ: So, Your Honor, these -- this testimony also applied to as well as the CEO.

The testimony was echoed by Mr. Dubel, another member of the board. And I'm not going to put his testimony on the screen, but it can be found at Pages 272 to 281 of Exhibit 2, which is the February 2nd transcript.

Movants argue, however, that res judicata doesn't apply because the Court didn't have jurisdiction to enter these orders. And they argue that the order stripped the District Court of this jurisdiction. As I previously described, the Debtor is prepared to modify the governance orders to provide that the Court shall retain jurisdiction to -- on claims that pass through the gate only to the extent legally permissible. The modification does not appear to be good enough for the Movants. They continue to argue that the Bankruptcy Court can't even act as the exclusive gatekeeper to determine whether such actions are colorable as a prerequisite for commencing or pursuing an action.

The problem Movants run into is the Fifth Circuit's opinion of *Republic v. Shoaf* and various Supreme Court decisions, including *Espinosa*.

In *Shoaf*, the Fifth Circuit held that a party cannot subsequently challenge a confirmed plan that clearly and unambiguously released a third party, even if the Bankruptcy

Court lacked jurisdiction to approve the release in the first place. Movants' proper recourse was to appeal the governance orders, not to seek to collaterally attack them.

In *Shoaf*, the Fifth Circuit held that the confirmed plan was res judicata with respect to a suit by the creditor against the guarantor. And in so ruling, the Fifth Circuit says that the prong of res judicata standard that requires an order, prior order to be made by a court of competent jurisdiction is satisfied regardless of whether the issue was actually litigated. This is because whenever a court enters an order, it does so by implicitly making a finding of its jurisdiction, a determination that can't be attacked. And in fact, in the January 9th and the July 16th orders, it wasn't implicit, the Court's jurisdiction; it was set out that the Court had core jurisdiction.

Movants try to brush *Shoaf* aside, arguing that is the only case the Debtor cites to support res judicata argument and is a narrow opinion that has been questioned and distinguished. That's just not correct, Your Honor. Movants ignore that we have cited two United States Supreme Court cases, *Stoll v. Gottleib* and *Chicot County Drainage District*, upon which the Fifth Circuit based its *Shoaf* decision. In each case, the U.S. Supreme Court gave res judicata effect to a Bankruptcy Court order that made a ruling party -- that a ruling party later claimed was beyond the Court's jurisdiction to do so.

In *Stoll*, it was a release of guaranty without jurisdiction, like *Shoaf*. In *Chicot*, it was an extinguishment of a bond claim without jurisdiction.

Similarly, Your Honor, the U.S. Supreme Court held in *Espinosa* that a party was not entitled to reconsideration of a Bankruptcy Court order under Federal Rule of Civil Procedure 60(b)(4) discharging a student loan without making the required statutory finding of undue hardship in an adversary proceeding. And the Supreme Court reasoned in that opinion as follows: A judgment is not void, for example, simply because it may have been erroneous. Similarly, a motion under 60(b)(4) is not a substitute for a timely appeal. Instead, 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or a violation of due process that deprives a party of notice or the opportunity to be heard.

Federal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved it only for the exceptional case in which the court that rendered the judgment lacked even an arguable basis for jurisdiction. This case is not the exceptional -- exceptional circumstance that was referred to by *Espinosa*.

In addition, we argue in our brief, and I'll get to in a few moments, that both of the orders are justified under the

Barton doctrine.

Actually, before I go to that, Your Honor, I think Movants are really trying to distinguish *Espinosa* by arguing that the Court's order exculpating Mr. Seery for negligence liability did not provide people, mom-and-pop investors, with the due process informing them that they would not be able to assert duty claims based upon mere negligence. I think that's the core of Mr. Bridges' argument, that, hey, you entered an order, you gave this exculpation, it was inappropriate, and it couldn't be done.

There are several problems with Movants' argument. First, Movants mischaracterize both the facts and the law in connection with the Debtor's relationship with its investors. The Debtor is the registered investment advisor for HCLOF as well as approximately 15 to 18 CLOs. The only investor in HCLOF other than the Debtor is CLO Holdco. The investors in the CLOs are the retail funds advised by the Dondero advisors and the other -- and other institutional investors. Accordingly, the thousands of investors, the mom-and-pop investors whose due process rights have allegedly been trampled by the January 9th and July 16th orders, are not investors in any funds managed by the Debtor.

And, of course, I have mentioned, as I've mentioned before, no non -- non-Dondero investor, be it a mom-and-pop investor, another institutional investor, anyone unrelated to

Mr. Dondero, has ever appeared in this Court to challenge the Debtor's activities.

But more fundamentally, Your Honor, the Debtor does not owe fiduciary duties to investors in any of the funds that the Debtor advises. The fiduciary duty that the Debtor owes is to the funds themselves, not the investors in the funds.

And while Movants point to Mr. Seery's prior testimony to support the argument that the Debtor owes a duty to investors, Mr. Seery was not testifying as a lawyer and his testimony just cannot change the law.

As to each of the funds that the Debtor manages, HCLOF and the CLOs, they were each provided with actual notice of the January 16th -- the July 16th order and didn't object. And as Your Honor will recall, the Trustees for the CLOs, the party that could potentially have claims for breach of fiduciary duty, they participated in the January 9th hearing. They came to the Court and were concerned about the protocols that the Debtor was agreeing to with the Committee. We revised them. The Trustees didn't object. They didn't object then; they didn't object now. And, in fact, they consented to the assumption of the contracts between the Debtor and the CLOs.

So the argument that the orders, by having this exculpation for future conduct, violated due process rights of anyone and is the type -- essentially, the type of order that *Espinosa* would have contemplated could be attacked, is --

relies on faulty legal and factual premises. No duty to investors. No private right of action. And both -- and all the funds received due process.

In addition, Your Honor, as we argue in our brief and I'll get to in a few moments, both of the orders are justified under the *Barton* doctrine, as Mr. Seery is entitled to protection based upon how courts around the country have interpreted the *Barton* doctrine. As such, Mr. Seery is performing his role both as an agent of the independent board under the January 9th order, as a CEO under the July 16th order, as a quasi-judicial officer. And as Your Honor examined in the *Ondova* opinion which you mentioned, trustees are entitled to qualified immunity for damage to third parties resulting from simple negligence, provided that the trustee is operating within the scope of his duties and is not acting in an *ultra vires* manner.

So, exculpating the independent directors, their agents, and the CEO in the January 9th and July 16th orders was a recognition by this Court that they would be entitled to qualified immunity, much in the same way trustees are.

No doubt that Movants contend that this was error and that the Court overreached. However, the remedy for that overreach was an appeal, not a reconsideration 16 months later. The Court's orders based upon the determination that in this highly contentious case that these court officers needed to be

protected from negligence suits is not the exceptional case where the Court lacked any arguable basis for jurisdiction. Accordingly, this Court must follow *Espinosa*, *Shoaf*, *Stoll*, and *Chicot* and reject the attack on the prior court orders.

The only case Movants cite to challenge the Supreme Court's decision -- to challenge the Supreme Court precedent I mentioned and the Fifth Circuit's *Shoaf* decision is the *Applewood* case. *Applewood* is totally consistent with *Shoaf*. *Applewood* also involved a plan that purported to release a guaranty claim that the guarantor argued was res judicata in subsequent litigation regarding the guaranty. The Fifth Circuit held in that case that the plan was not res judicata. It made that ruling because the plan did not contain clear and unambiguous language releasing the guaranty. In that way, the Fifth Circuit distinguished *Shoaf*.

Applewood and *Shoaf* are consistent. A Bankruptcy Court order will be given res judicata effect, even if the Court didn't have jurisdiction to enter it, if the order was clear and unambiguous. In *Shoaf*, the release was. In *Applewood*, it wasn't.

Movants argued on June 8th and argue now that the *Applewood* case really argues -- really deals with prospective exculpation of claims. I went back and read Mr. Bridges' comments carefully of June 8th. He said *Applewood*, exculpation. Well, that's just not correct. *Applewood* is all

about requiring specificity of a (garbled) to give it res judicata effect. Claims that existed at that time, were they described clearly and unambiguously? Yes? *Shoaf* applies. No? *Applewood* does -- applies.

So how should the Court apply these principles here? The Court approved a procedure for certain claims in the governance orders. The procedure: come to Bankruptcy Court before pursuing a claim against the independent directors and Seery or their agents so that the Court can make a colorability determination. Clear and unambiguous. The governance orders each provide that the Bankruptcy Court had jurisdiction to enter the orders, and the orders were not appealed.

Movants attempt to confuse the Court and argue *Applewood* is on point because the January 9th and July 16th orders do not clearly identify specific claims that Movants now have that are being released. And because they're not specific, then basically it's an ambiguous release and *Applewood* applies.

The problem with the Movants' argument is that neither the January 9th or July 16th orders released claims that existed at that time. If they did, and if there wasn't an adequate description, I might agree with Mr. Bridges that *Applewood* applied. But there were no claims. It was prospective. It was a standard of care. The Court clearly and unambiguously

said what the standard of care would be going forward. Clearly, under *Shoaf* and Supreme Court precedent, they are entitled to res judicata because it's a clear and unambiguous provision. *Applewood* just simply doesn't apply.

Mr. Phillips at the last hearing made an impassioned plea to the Court for a narrow interpretation of the exculpation provisions in the January 9th and July 16th orders, and he argued that the Court could not possibly have intended for the exculpation for negligence to apply on a go forward basis. He thus argued to the Court that the Court should construe the exculpation narrowly and only apply it to potential claims of harm caused to the Debtor, as opposed to harm caused to third parties, which he said included thousands of innocent investors.

Of course, Mr. Phillips made those arguments unburdened by the actual facts and the prior proceedings which led to the entry of these orders, because, as he was the first to admit, he only became involved in the case a month ago.

As the Court recalls, and as reinforced by Mr. Seery's and Mr. Dubel's testimony I just mentioned, the exculpation provisions were included precisely to prevent Mr. Dondero, through any one of the entities he's owned and controlled, the Movants being two of those, from asserting baseless claims against the beneficiaries of those orders, exactly the situation Mr. Seery now finds himself in.

And, again, it bears emphasizing: throughout this case, not one of the purported public investors Mr. Phillips lamented would be prevented from holding Mr. Seery responsible for his conduct has ever appeared in this case to object about anything. And none of the directors of the funds, the funds where the Debtor acts as an investment adviser, have ever stepped foot in this court, either.

Even if the Court declines to apply res judicata, Your Honor, to prevent challenges to the governance orders, the Court has the jurisdiction, had the jurisdiction to include the gatekeeping provisions in those orders. The Bankruptcy Court derives its jurisdiction from 28 U.S.C. Section 157, and bankruptcy jurisdiction is divided into two parts: core matters, which are those arising in or arising under Title 11, and noncore matters, those matters which are related to a Chapter 11 case.

Bankruptcy Courts may enter final orders in core proceedings, and with the consent of parties, noncore proceedings. If a party does not consent to a final judgment in the noncore matters or waives its right to consent, then the Bankruptcy Court -- or does not waive its right to consent, then the Bankruptcy Court issues a report and recommendation to the District Court.

The seminal Fifth Circuit case on bankruptcy court jurisdiction is the 1987 case of *Wood v. Wood*, 825 F.2d 90.

There, the Fifth Circuit held that the Bankruptcy Court has related to jurisdiction over matters if the outcome of that proceeding could conceivably have any effect on the estate being administered in the bankruptcy.

More recently, the Fifth Circuit, in the 2005 case, in *Stonebridge Tech's*, elaborated on when a matter has a conceivable effect on the estate such as to confer Bankruptcy Court jurisdiction. There, the Fifth Circuit held that an action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action, either positively or negatively, and which in any way impacts upon the handling and the administration of the bankruptcy estate. It is against this backdrop, Your Honor, that the Court should evaluate its jurisdiction to have entered the orders.

So, again, what did the orders do? They established governance over the Chapter 11 debtor with new independent directors being approved. They established the procedures and protocols of how transactions were going to be presented to and approved by the Committee. They vested in the Committee certain related-party claims, and they provided for the procedures parties would have to follow to assert any claims against the independent directors and the CRO and the agents and advisors.

Your Honor, it's hard to imagine that there is a more core

order than the entry of these orders. At the time the orders were entered, the Court was well aware of the potential for acrimony from Mr. Dondero and his related entities, and included the gatekeeper provisions to prevent the Debtor's estate from being embroiled in frivolous litigation against the board and the CEO.

Such protections were clearly within the Court's jurisdiction, both to protect the administration of the estate but also under applicable Fifth Circuit law dealing with vexatious litigants, as set forth in the *Baum* and *Carroll* cases that the Court cited in its confirmation order.

Not that it was hard to predict, but the last several months have reinforced how important the gatekeeping provisions in the order are and how important similar provisions in the plan are.

The Court heard extensive testimony at the confirmation hearing regarding the havoc continued litigation by Mr. Dondero and his related entities would cause, which predictions have unfortunately been borne out by the unprecedented blizzard of litigation involving Mr. Dondero and his related entities that has consumed the Court over the last several months and caused the estate to incur millions of dollars in fees that could have been used to pay its creditors.

And these attacks are continuing. As I mentioned before,

in addition to the DAF lawsuit, Sbaiti & Co. filed an action against the Debtor on behalf of PCMG, another related entity, alleging postpetition mismanagement of the Select Fund.

And to complete the hat trick, they are the lawyers seeking to sue Acis in the Southern District of New York for allegedly post-confirmation matters.

The Court knew then and certainly knows now that the potential for sizable indemnification claims could consume the estate. The Court used that as the potential basis for determining that the orders were within its jurisdiction, just as it used that potential to justify the exculpation provisions in the plan as being consistent with *Pacific Lumber*.

Movants also ignore the cases -- and we cited in our opposition -- where courts in this district, including Judge Lynn in *Pilgrim's Pride* in 2010 and Judge Houser in the *CHC Group* in 2016, approved gatekeeper provisions that provided the Bankruptcy Court with exclusive jurisdiction to adjudicate claims against postpetition fiduciaries.

Movants also ignore cases outside this district, including *General Motors* and *Madoff*, which we cited in our brief as examples of cases where Bankruptcy Courts have been used as gatekeepers to determine if claims are colorable or being asserted against the correct entity.

And there's another reason, Your Honor, why Movants may

now not contest the Court's jurisdiction to have entered those orders. Each of those orders, as I said before, include a finding that the Court had core jurisdiction to enter the orders. No party contested that finding or refused to consent to the core jurisdiction.

Under well-established Supreme Court precedent, parties can waive their right to challenge the Bankruptcy Court's jurisdiction, core jurisdiction, by failing to object. In *Wellness v. Sharif* in 2015, the Supreme Court expressly held that Article III was not violated if parties knowingly and voluntarily consented to adjudication of *Stern v. Marshall*-type alter ego claims, and that the consent need not be express, so long as it was knowing and voluntary.

And *Wellness* confirmed the pre-*Stern* opinion of the Fifth Circuit in the 1995 *McFarland* case, which held that a person who fails to object to the Bankruptcy Court's assumption of core jurisdiction is deemed to have consented to the entry of a final order by the Bankruptcy Court.

Your Honor, I'd now like to turn to the *Barton* doctrine. The Court also has jurisdiction to have entered the orders based upon the *Barton* doctrine. The *Barton* doctrine dates back to an old United States Supreme Court case and provides as a general rule that, before a suit may be brought against a trustee, consent from the appointing court must be obtained.

Movants essentially make two arguments why the *Barton*

doctrine doesn't apply.

First, Movants, without citing any authority, argue that it does not apply to Mr. Seery because he is not a trustee or receiver and was not appointed by the Court. Although the doctrine was originally applied to receivers, it has been extended over time to cover various court-appointed fiduciaries and their agents in bankruptcy cases, including debtors in possession, officers and directors of the debtor, and the general partner of the debtor. And although Mr. Bridges says he couldn't find one case that applied the *Barton* doctrine to a court-retained professional, I will now talk about several such cases.

In *Helmer v. Pogue*, a 2012 case cited in our brief, the District Court for the Northern District of Alabama extensively analyzed the *Barton* doctrine jurisprudence from the Eleventh Circuit and beyond and concluded that it applied to debtors in possession. The *Helmer* Court relied in part on a prior 2000 decision of the Eleventh Circuit in *Carter v. Rodgers*, which held that the doctrine applies to both court-appointed and court-approved officers of the debtor, which is consistent with the law in other circuits.

And subsequently, the Eleventh Circuit again considered -- and in that case, the distinction of a court-appointed as a court-retained professional was -- was not persuasive to the Court, and the Court held that a court-retained professional

can still have *Barton* protection, notwithstanding that he wasn't appointed, the argument that Mr. Bridges tries to make.

And subsequently, --

THE COURT: I wonder, was that -- was that Judge Clifton Jessup, by chance? Or maybe Bennett?

MR. POMERANTZ: Your Honor, this was -- this was the Eleventh Circuit *Carter v. Rodgers*, so I think Judge Jessup was --

THE COURT: Oh, I thought you were still talking about the Alabama case. No?

MR. POMERANTZ: Yeah, the Alabama -- well, the Alabama case referred to the Eleventh Circuit case, *Carter v. Rodgers*, --

THE COURT: Okay.

MR. POMERANTZ: -- and the appointment and -- or retention issue was discussed in the *Carter v. Rodgers* case.

THE COURT: Okay.

MR. POMERANTZ: And subsequently, the Eleventh Circuit again considered the contours of the *Barton* doctrine in *CDC Corp.*, a 2015 case, 2015 U.S. App. LEXIS 9718. In that case, which Your Honor referenced in your *Ondova* opinion, which I will discuss in a few moments, the Eleventh Circuit held that a debtor's general counsel who had been approved by the Court, who was appointed by a chief restructuring officer who was also approved by the Court, was covered by the *Barton*

doctrine for acts taken in furtherance of the administration of the estate and the liquidation of the assets.

And the Eleventh Circuit last year, in *Tufts v. Hay*, 977 F.3d 204, reaffirmed that court-approved counsel who function as the equivalent of court-appointed officers are entitled to protection under *Barton*. While the Court in that case ultimately ruled that counsel could be sued without first going to the Bankruptcy Court, it did so because it determined that the suit between two sets of lawyers would not have any effect on the administration of the estate.

So, Your Honor, not only is there authority, there is overwhelming authority that Mr. Seery is entitled to the protections.

In *Gordon v. Nick*, a District -- a case from 1998 from the Fourth Circuit, the Court that the *Barton* doctrine applied to a lawsuit against a general partner who was responsible for administering the bankruptcy estate.

And as I mentioned, Your Honor, and as Your Honor mentioned, Your Honor had reason to look at the *Barton* doctrine in length and in depth in the 2017 *Ondova* opinion. And in the course of the opinion, Your Honor discussed one of the policy rationales for the doctrine, which you took from the Seventh Circuit's *Linton* opinion, and you said as follows: "Finally, another policy concern underlying the doctrine is a concern for the overall integrity of the bankruptcy process

and the threat of trustees being distracted from or intimidated from doing their jobs. For example, losers in the bankruptcy process might turn to other courts to try to become winners there by alleging the trustee did a negligent job."

Here, the independent board was approved by the Court as an alternative to the appointment of a Chapter 11 trustee. And it and its agent, including Mr. Seery as the CEO, even before the July 16th order, were provided protections in the form of the gatekeeper order and exculpation.

I'm sure the Court has a good recollection of the January 9th hearing -- we've talked about it a lot in the proceedings before Your Honor -- where the Debtor and the Committee presented the governance resolution to Your Honor. And as Your Honor will recall, the appointment of the board was a hotly-contested issue among the Debtor and the Committee and was heavily negotiated. And the appointment of the independent board was even contested by the United States Trustee at a hearing on January 20th, 2020.

I refer the Court to the transcripts of the hearings on January 9th and January 20th of 2020, which clearly demonstrate that appointing this board and giving it the rights and protections and its agents the rights and protections was not your typical corporate governance issue, but it was essentially the Court's alternative to appointing a trustee. And recognizing that the members of the independent

board were essentially officers of the Court, the Court approved the gatekeeper provision, requiring parties first to come and seek the Court's permission before suing them, in order to prevent them from being harassed by frivolous litigation.

And the independent board was given the responsibility in the January 9th order to retain a CEO it deemed appropriate, and it did so by retaining Mr. Seery.

Recognizing the *Barton* doctrine as it applies to Mr. Seery is consistent with a legion of cases throughout the United States, and Movants' argument that Mr. Seery is not court-appointed is just wrong.

Second, Your Honor, Movants cite without any authority, argue that even if the *Barton* doctrine applied there is an exception which would allow it to pursue a claim against Mr. Seery without leave of the Court.

The Debtor agrees the 28 U.S.C. § 959 is an exception to the *Barton* doctrine. Section 959(a) provides that trustees, receivers, or managers of any property, including debtors in possession, may be sued without leave of the court appointing them with respect to any of their acts or transactions in carrying on business connected with such property.

As the Court also pointed out at the June 8th hearing, and Mr. Bridges alluded to in his argument, the last sentence of 959(a) provides that such actions -- clearly referring to

actions that may be pursued without leave of the appointing court -- shall be subject to the general equity power of such court, so far as the same may be necessary to the ends of justice.

And Mr. Bridges made a plea, saying you can't take away my jury trial right there. You just cannot do that. Well, I have two answers to that, Your Honor. One, they relinquished their jury trial right. We've established that. Okay?

The second is allowing Your Honor to act as a gatekeeper has nothing to do with their jury trial right. Allowing Your Honor to act as a gatekeeper allows you to determine whether the action could go forward, and it'll either go forward in Your Honor's court or some other court.

And the argument that the exculpation was essentially a violation of 959 is just -- is just -- it just is twisting what happened. You have an exculpation provision. We already went through the authority the Court had to give an exculpation. With respect to these litigants who are before Your Honor -- we're not talking about anyone else who's coming in to try to get relief from the order; we're talking about these litigants -- we've already established that they were here, they're bound by res judicata. So their 959 argument goes away.

And as the Court -- and separate and apart from that, the issue at issue in the District Court litigation is -- is not

even subject to 959.

Mr. Bridges says, well, of course it is because it deals with the administration of the estate. I'd like to refer to what the Court said -- this Court said in its *Ondova* opinion: The exception generally applies to situations in which the trustee is operating a business and some stranger to the bankruptcy process might be harmed, such as a negligence claim in a slip-and-fall case, and is inapplicable to suits based upon actions taken to further the administering or liquidating the bankruptcy estate.

And your *Ondova* opinion is consistent with the Third and Eleventh Circuit opinions Your Honor cited in your opinion, as well as numerous other --

(Interruption.)

MR. POMERANTZ: -- from the -- from around the country, including cases from the First, Second, Sixth, Seventh, and Ninth Circuits. And I'm not going to give all the cites to those cases, but it's not a -- it's not a remarkable proposition that Your Honor relied on in *Ondova*.

In addition, several of these cases, including the Eleventh Circuit's *Carter* opinion, have been cited with approval by the Fifth Circuit in *National Business Association v. Lightfoot*, a 2008 unpublished opinion for this very point. The *Barton* exception of 959 does not apply to actions taken in the administration of the case and the liquidation of assets

in the estate.

Suffice it to say that it's clear that the Section 959 exception to *Barton* has no applicability in this case. Movants, hardly strangers to the bankruptcy case, want to sue Mr. Seery for acts taken relating to a settlement of very complex and significant claims against the estate. They want to sue a court-appointed fiduciary for doing his job, resolving claims against the estate and his management of the bankruptcy estate. And they want to do this outside of the Bankruptcy Court.

Settlement of the HarbourVest claim, which is where this claim arises under -- whether it's a collateral attack now or not, and we say it is, is for another issue -- but it clearly arises in the context of settlement of the HarbourVest claim, is the quintessential act to further the administration and liquidation of the bankruptcy estate, and certainly doesn't fall within the 959 exception.

Movants seem to be arguing that 959(a) makes a distinction between claims against Mr. Seery that damaged the Debtor and claims against Mr. Seery that damaged third parties. However, the Movants make up that distinction, and it's not in the statute, it's not in the case law. The focus is not on who the conduct damages, but it's rather on whether the conduct was taken in connection with the administration or the liquidation of the estate.

And even if the Debtor is wrong, Your Honor, which it's not, the savings clause allows the Court to determine whether leave to be -- sue will be granted. Given that these claims are asserted by Dondero-related entities, if not controlled entities, no serious argument exists that the equities do not permit this Court to determine if leave to sue is appropriate.

Accordingly, Movants' argument that the orders create this tension with 959 is simply an over-dramatization. And in any event, Your Honor, there's a basis independent of *Barton* that supports the jurisdiction to enter the orders, as I mentioned.

But even if the orders only relied on *Barton*, there is an easy fix to Movants' concerns: let them come to court and argue that the type of suit they are bringing allegedly falls within the exception of 959.

Your Honor, Movants argue that the Bankruptcy Court may not act as a gatekeeper if it would not have jurisdiction to deal with the underlying action. They essentially argue that an Article I judge may not pass on the colorability of a claim, that it should be decided by an Article III judge. This is the same argument, Your Honor, that Your Honor rejected in connection with plan confirmation and which I touched on earlier.

And the reason why Your Honor rejected it is because there's no law to support it. In fact, there is Fifth Circuit law that holds to the contrary. And we talked about a little

bit the Fifth Circuit case decided is *Villegas v. Schmidt* in 2015. And *Villegas* is a simple case. Schmidt was appointed trustee over a debtor and liquidated its estate and the Bankruptcy Court approved his final fees. Four years later, Villegas and the prior debtor sued Schmidt in District Court, the district in which the Bankruptcy Court was pending, arguing that he was negligent in the performance of his duties. The District Court dismissed the case because Villegas failed to obtain Bankruptcy Court approval to bring the suit under the *Barton* doctrine.

On appeal, Villegas argued *Barton* didn't apply for two reasons. First, that *Stern v. Marshall* created an exception to the *Barton* doctrine for claims that the Bankruptcy Court would not have the jurisdiction to adjudicate. And second, that *Barton* did not apply if the suit is brought in the District Court, which exercises supervisory authority over the Bankruptcy Court that appointed the trustee. Pretty much the argument that was made by Movants at the contempt hearing.

The Fifth Circuit rejected both arguments. It held that the existence of a *Stern* claim does not impact the Bankruptcy Court's authority because *Stern* did not overrule *Barton* and the Supreme Court had cautioned circuit courts against interpreting later cases as impliedly overruling prior cases.

More importantly, the Fifth Circuit pointed to a post-*Stern* 2014 case, *Executive Benefits v. Arkison*, 573 U.S. 25

(2014), which held that *Stern* does not decide how a Bankruptcy Court or District Courts should proceed when a *Stern* creditor is identified, as support for the argument that *Barton* is still good law, even dealing with a *Stern* claim.

Second, the Fifth Circuit, joining every circuit to have addressed the issue, ruled that the District Court and the Bankruptcy Court are distinct from one another and the Bankruptcy Court has the exclusive authority to determine the colorability of *Barton* claims and that the supervisory District Court does not.

Movants didn't address *Villegas* in their reply. Briefly tried to distinguish it, unconvincingly, today. The bottom line is *Villegas* is directly applicable. Your Honor cited it in the *Ondova* opinion for precisely the proposition that *Barton* applies whether or not the Court has authority to adjudicate the claim.

Accordingly, Your Honor, it was within the Court's jurisdiction to require a party to seek approval of Your Honor on the colorability of a claim before an action may be commenced or pursued against the protected parties, even if Your Honor wouldn't have authority to adjudicate the claim at the end of the day.

In fact, some courts have even addressed the proper procedure for doing so, requiring the putative plaintiff to not only seek leave of Bankruptcy Court but also to provide a

draft complaint and a basis for the Court to determine if the claim is colorable.

Movants have done neither, and they should not be permitted to modify the final orders of the Court as a workaround.

Your Honor, that concludes my presentation. I'm happy to answer any questions Your Honor may have.

THE COURT: All right. Not at this time. All right. I'm going to figure out, do we need a break or not, depending on what Mr. Bridges tells me. I assume we're just doing this on argument today. I think that's what I heard. No witnesses or exhibits.

MR. BRIDGES: That is correct, Your Honor.

THE COURT: Okay. Mr. Bridges, how long do you expect your rebuttal to take so I can figure out does the Court need a break?

MR. BRIDGES: Fifteen minutes plus whatever it takes to submit agreed-to exhibits.

THE COURT: Okay. Let's take a five-minute bathroom break. We'll come back. It's -- what time is it? It's 1:11 Central time. We'll come back in five minutes.

THE CLERK: All rise.

(A recess ensued from 1:11 p.m. until 1:17 p.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated. We're

going back on the record in the Highland matters.

Mr. Bridges, time for your rebuttal. I want to ask you a question right off the bat. Mr. Pomerantz pointed out something that was on my list that I forgot to ask you when you made your initial presentation. What is the authority you're relying on? You did not cite a statute or a rule *per se*, but I guess we can probably all agree that Bankruptcy Rule 9024 and Federal Rule 60 is the authority that would govern your motion, correct?

MR. BRIDGES: I don't agree, Your Honor. I don't believe this is a final order that we're contesting here. And I think that's demonstrated by the Court's final confirmation -- plan -- plan confirmation order that seeks to modify this order or will modify this order upon being -- being effective. So I don't think so.

In the alternative, if we are challenging a final order, then I think you're right as to the rules that would be controlling.

THE COURT: All right. Well, let me back up. Why exactly do you say this would be an interlocutory order as opposed to a final order?

MR. BRIDGES: Because of its nature, Your Honor. While the appointment in the order or the approval of the appointment in the order might, as a separate component of the order, have -- have finality, the provisions -- the provisions

in it relating to gatekeeping and exculpation are, we think, by their very nature, quite obviously interlocutory and not permanent. They don't seem to indicate an intention by any of the parties that, 30 years from now, if Mr. Seery is still CEO at Highland, long after the bankruptcy case has ended, that nonetheless parties would be prohibited from bringing claims, strangers to this action would be prohibited from bringing claims related to his CEO role.

I think the nature of it demonstrates that, the modifications to it, and even the inclusion of it in the final plan confirmation, as well as -- can't read that.

THE COURT: Can you give me some authority? Because as we know, there's a lot of authority out there in the bankruptcy universe on what discrete orders are interlocutory in nature that a bankruptcy judge might routinely enter and which ones are final. You know, it would just probably, if I flipped open *Collier's*, I could -- you know, it would be mind-numbing.

So what authority can you rely on? I mean, is there any authority that says an employment order is not a final order? That would be shocking to me if you have cases to that effect, but, I mean, of course, sometimes we do interim on short notice and then final. But this would be shocking to me if there is case authority to support the argument this is not a final order. But I learn something new every day, so maybe I

would be shocked and there is.

MR. BRIDGES: Your Honor, I'd point you to *In re Smyth*, 207 F.3d 758, and *In re Royal Manor*, 525 B.K. 338 [sic], for the proposition that retaining a bankruptcy professional is an interlocutory order.

THE COURT: Okay. Stop for a moment. The *Smyth* case. Which court is that?

MR. BRIDGES: Fifth Circuit.

THE COURT: Okay. So tell me the facts. I'm surprised I don't know about this case. But, again, I don't know every case. So, it held that an employment order is an interlocutory order?

MR. BRIDGES: Appointing counsel. A professional in the bankruptcy context, Your Honor.

THE COURT: Counsel for a debtor-in-possession? An order approving counsel was an interlocutory order?

MR. BRIDGES: Yes, or the Trustee's counsel.

THE COURT: Or the Trustee's counsel? Okay. What were the circumstances? Was this on an expedited basis and there wasn't a follow-up final order, or what?

MR. BRIDGES: Your Honor, I don't have -- I don't have that at the tip of my memory. I'm sorry.

THE COURT: Okay. And the other one, 525 B.R. 338, what court was that?

MR. BRIDGES: It's a Bankruptcy Court within the

Sixth Circuit. I'm not certain which district.

THE COURT: All right. Well, maybe one of you two over there can look them up and give me the context, because that is surprising authority. Or other lawyers on the WebEx maybe can do some quickie research.

Okay. We'll come back to that. But assuming that this was a final order, which I have just been presuming it was, Rule 60 is the authority you're going under? 9024 and Rule 60, correct?

MR. BRIDGES: Your Honor, we have not invoked those rules. Alternatively, I think you're right that they would control if we are wrong about the interlocutory nature of the order.

THE COURT: Well, you have to be going under certain -- some kind of authority when you file a motion. So I'm --

MR. BRIDGES: As an alternative --

THE COURT: I'm approaching this exactly, I assure you, as the District Court or a Court of Appeals would. You know, you start out, what is the legal authority that is being invoked here?

MR. BRIDGES: Well, --

THE COURT: So I just assume Rule 60. I can't, you know, come up with anything else that would be the authority.

MR. BRIDGES: Yes, Your Honor. You also have inherent power to modify orders that are in violation of the

law. And we pointed you to --

THE COURT: Now, is that right? Is that really right? Why do we have Rule 60 if I can just willy-nilly, oh, I feel like I got that wrong two years ago? I can't do that, can I? Rule 60 is the template for when a court can do that. Parties are entitled to rely on orders of courts. And that's why we have Rule 60, right? So, --

MR. BRIDGES: Your Honor, I think -- I think that we're miscommunicating. I'm trying not to rely on Rule 60 in the first instance because in the first instance we view this as not a final order. So, in the first instance, --

THE COURT: I got that. And I've got my law clerks looking up your cases to see if they convince me. But I'm asking you to go to layer two. Assuming I don't agree with you these are final orders, what is your authority for the relief you're seeking?

MR. BRIDGES: Yes, Your Honor. Rule 60 would apply in the alternative.

THE COURT: All right.

MR. BRIDGES: That's correct.

THE COURT: So, which provision? Which provision of Rule 60? (b) what?

MR. BRIDGES: Your Honor, I'm not prepared to concede any of them. I don't have the rule in front of me.

THE COURT: You're not prepared to concede what?

MR. BRIDGES: Any of the provisions of Rule 60. Just (b)(1), (b)(2), especially, but I'm -- I'm -- Rule 60 is our basis, as is the particulars (b)(1), (2), (6) --

(Garbled audio.)

THE COURT: Okay. You're breaking up. Can you restate?

MR. BRIDGES: (b)(1), (2), and (6), as -- as well as any other provision, Your Honor, of Rule 60.

THE COURT: Okay. Well, so (1), mistake, inadvertence, surprise, excusable neglect. Which one of those?

MR. BRIDGES: All of the above, Your Honor.

THE COURT: Surprise? Who's surprised?

MR. BRIDGES: Your Honor, I think every potential litigant who discovers that your order purports to bar prospective unaccrued claims at the time the order issued would be surprised.

Frankly, I think Mr. Seery would be surprised, given his testimony that he owes fiduciary duty -- duties that he must abide by and that he appears to have, as I continue to represent to clients, to advisees, and to the SEC, that those duties are owing.

THE COURT: Okay. I'm giving you one more chance here to make clear on the record what provision of Rule 60(b) are you relying on, okay? I need to know. It's not in your

pleading.

MR. BRIDGES: Your Honor, --

THE COURT: So tell me specifically. I can only --

MR. BRIDGES: -- (b)(1) --

THE COURT: -- come up with a result here if I know exactly what's being presented.

MR. BRIDGES: Your Honor, (b)(1), (b)(2), and (b)(6) --

THE COURT: Which, okay, there are multiple parts to (1). You're saying somebody's surprised by the ruling. I don't know who. Really, all that matters is your client, the Movants. You're saying, even though they participated, --

MR. BRIDGES: Yes, Your Honor.

THE COURT: -- got notice, they're somehow surprised? Why are they surprised?

MR. BRIDGES: Yes, Your Honor.

THE COURT: Do you have evidence of their surprise?

MR. BRIDGES: Your Honor, our brief shows the intentions of all involved were not the interpretation of that order being advanced at this -- at this point in time. And so, yes, I believe that is evidence. The transcripts of the hearings I believe evidence that as well, that the understanding of everyone involved was not that future -- unspecified future claims that had not accrued yet would be released under (b)(1). Yes, Your Honor.

THE COURT: Okay.

MR. BRIDGES: Under (b)(2), --

THE COURT: I don't have any evidence of that. All I have is the clear wording of the order. Okay. Let me just -- just let me go through this.

Assuming Rule 60 (1) through (6) are what you're arguing here, what about Rule 60(c): a motion under Rule 60(b) must be made within a reasonable time? We're now 11 months --

MR. BRIDGES: Your Honor, --

THE COURT: We're now 11 months past the July 2020 order. What is your authority for this being a reasonable time?

MR. BRIDGES: Yes, Your Honor. If I may back up one step before answering your question. Under (b)(2), we're relying on newly-discovered evidence that was discovered in late March and caused both the filing of this motion and the filing of the District Court action.

Under (b)(4), we believe that the order is --

THE COURT: Let me stop. Let me stop. What is my evidence that you're putting in the record that's newly discovered?

MR. BRIDGES: The evidence is detailed in the complaint that is in the record. You know, --

THE COURT: That's not evidence.

MR. BRIDGES: -- honestly, Your Honor, --

THE COURT: That is not evidence. Okay? A lawyer-drafted complaint in another court is not evidence. Okay?

MR. BRIDGES: Your Honor, I think, to be technical, that there is not a record yet, that we have evidence yet to be admitted on our exhibit list. I believe in this circumstance -- I understand that, in general, allegations in a pleading are not evidence. In this instance, when we're talking about whether or not new facts led to the filing of a lawsuit, I do believe that the allegations in the lawsuit are evidence of those new facts.

THE COURT: All right. Go on.

MR. BRIDGES: Under (b)(4), we believe the order is, in part, void. It is void because of the jurisdictional and other defects noted in our argument.

And also, under (b)(6) (garbled) ground for relief that we're appealing to the equitable powers of this Court to correct errors and manifest injustice towards not just the litigants here but to correct the order of the Court to make it comply with -- with the law, with the statutes promulgated by Congress and to respect the jurisdiction of the District Court.

THE COURT: All right. Do you agree with Mr. Pomerantz that the case law standard for Rule 60(b)(4) is exceptional circumstances? It's only applied so that a judgment is voided in exceptional circumstances. Do you

disagree with that case authority?

MR. BRIDGES: I would -- I would agree, in part, that unusual circumstances is not the ordinary case. I'm not entirely sure what you mean by exceptional, but I think we're on the same page.

THE COURT: Okay. It's not what I mean. That's just the case law standard. And I'm asking, do you agree with Mr. Pomerantz that that is the standard set forth in case law when applying 60(b)(4)? There have to be some sort of exceptional circumstances where there's just basically no chance the Court had authority to do what it did.

MR. BRIDGES: Out of the ordinary would be the phrase I would use, Your Honor.

THE COURT: Okay. So I guess then I'll go from there. Is it your argument that gatekeeping provisions in the bankruptcy world are out of the ordinary?

MR. BRIDGES: The exculpation of Mr. Seery for liability falling short of gross negligence or intentional wrongdoing in connection with his continuing to conduct the business of the Debtor as an investment advisor subject to the Advisers Act, yes, I would say that is out of the ordinary, that it is extraordinary, that it is --

THE COURT: Okay. What is your authority or evidence on that? Because this Court approves exculpation provisions regularly in connection with employment orders, and pretty

much every judge I know does. In fact, I'm wondering why this isn't just a term of compensation. You know, he's going to do x, y, z in the case. His compensation is going to be a, b, c, d, e. And by the way, we're going to set a standard of liability for his performance as CEO or investment banker, financial advisor, whatever, so that no one can sue him regarding his performance of his job duties unless it rises to the level of gross negligence, willful misconduct.

It's a term of employment that, from my vantage point, seems to be employed all the time. So it would be anything but exceptional circumstances. Do you have authority or evidence --

MR. BRIDGES: Your Honor, frankly, --

THE COURT: -- to the contrary?

MR. BRIDGES: Your Honor, frankly, I'm astonished at your view of that situation, that it would merely be a term of his employment, that vitiates the entire fiduciary duty standard created by the Advisers Act that tells him, with hundreds of millions of dollars of assets under management for people he's advising as a registered investment advisor, people he's advising who believe that he has a fiduciary duty to them and that it's enforceable, that the SEC, who monitors, believes he has an enforceable fiduciary duty to those people, and that he's testified that he has fiduciary duties to those people, and that Your Honor is saying no, just as a regular

term of employment we have undone the Advisers Act's imposition of an unwaivable fiduciary duty.

Your Honor, the order is void to the extent that it attempts to do so.

This is not an ordinary employment agreement, Your Honor. This is an attempt to exculpate someone from the key thing that our entire investment system depends upon, regulation by the SEC and the requirement in investment advisors to act as fiduciaries when they manage the money of another.

It would be the equivalent of telling lawyers who are appointed in a bankruptcy proceeding that they don't have any duties to their client, or at least not fiduciary duties. That the lawyers merely owe a duty not to be grossly negligent to their clients. That's not an ordinary term of employment, Your Honor.

THE COURT: All right. So I guess we're back to my question, was this brought within a reasonable time under Rule 60(c)?

MR. BRIDGES: It was brought very quickly after the new evidence was discovered at the end of March, Your Honor, yes.

THE COURT: Okay. Well, I guess I'll just ask you one more question before you continue on with your rebuttal argument. I mean, again, I want your best argument of why *Villegas* doesn't absolutely permit the gatekeeping provisions

that you're challenging. And many cases were cited by Mr. Pomerantz in his brief where courts have extended the *Barton* doctrine to persons other than trustees. And so what is your best rebuttal to that?

MR. BRIDGES: Your Honor, we've already given it. I'm afraid --

THE COURT: Okay. If you don't want to say more, --

MR. BRIDGES: -- what I have is not --

THE COURT: -- I'm not going to make you say more.

MR. BRIDGES: I --

THE COURT: I'm just telling you what's on my brain.

MR. BRIDGES: I do. I want to -- I am apologizing in advance for repeating, but yes, *Villegas*, *Villegas*, however that case is pronounced, says that *Stern* is not an exception to the *Barton* doctrine.

THE COURT: Uh-huh.

MR. BRIDGES: 959(a) is an exception to the *Barton* doctrine. You are not operating under the *Barton* doctrine here. Even counsel's brief, the Debtor's brief, doesn't say *Barton* applies. It says it's consistent with *Barton*.

Your Honor, in our previous hearing, you directed me to the second sentence of 959(a) because you believe it's what empowers you to do the gatekeeping. It limits the gatekeeping that you can do by protecting jury rights, the right to trial, says you cannot discharge, undo, deprive a litigant of their

right to a trial, a jury trial.

THE COURT: Well, you mentioned it again, jury trial rights. Do you have any argument --

MR. BRIDGES: Yes, Your Honor.

THE COURT: -- of why that hasn't flown out the window?

MR. BRIDGES: Yes, Your Honor. I am told that Section 14(f) that counsel for the Debtor referred to is not a waiver of jury rights at all. It is an arbitration agreement. Your Honor is probably familiar how arbitration agreements work, is that they need not be elected. They need not be invoked by the parties. When they are, they create a situation where arbitration may be required. But a waiver of a jury right outside of arbitration is not part of this arbitration clause, or of any. The issue is not briefed or in evidence before the Court. We're relying on representations of counsel as to what that provision contains. That Mr. Seery wasn't even a party to that agreement, the advisory agreement, with the Charitable DAF. The arbitration agreement is subject to defenses that are not at issue here before the Court. That Movants' rights, their contractual rights to invoke the arbitration clause, also appear to be terminated by the orders' assertion of sole jurisdiction in this matter.

Your Honor, yes, our jury rights survive Section 14(f) in the advisory agreement with the DAF for all of those potential

reasons.

On top of that, it doesn't go to all of our causes of action. It goes to the contract cause of action. And to the extent they can argue that the other claims are subject to arbitration, that also is a defense and -- defensible and complex issue requiring the application of the Federal Arbitration Act, requiring consideration of the Federal Arbitration Act, which this Court doesn't have jurisdiction to do under 157(d).

THE COURT: What? Repeat that.

MR. BRIDGES: Yes. This Court does not have jurisdiction to determine whether or not arbitration -- arbitration is enforceable due to the mandatory withdrawal of the reference provisions of 157(d).

THE COURT: That's just not consistent with Fifth Circuit authority. *National Gypsum*. What are some of these other arbitration cases? I've written an article on it. I can't remember them. That's just not right. Bankruptcy courts look at arbitration clauses all the time. Motions to compel arbitration.

MR. BRIDGES: Your Honor, under 157(d), in the circumstances of this case, if the Court is going to take into consideration an arbitration clause under the Federal Arbitration Act, when that clause is not in evidence and is not before the Court, then Movants respectfully move to

withdraw the reference of your consideration of that issue and of any proceeding and ask that you would issue only a report and recommendation rather than an order on that issue.

THE COURT: Okay. I regret that we even got off on this trail. I'm sorry. So just proceed with your rebuttal argument as you had envisioned it, Mr. Bridges.

MR. BRIDGES: Thank you, Your Honor.

Debtor's counsel says there's no private right of action under the Advisers Act. That is both inaccurate and misleading. The Advisory Act creates, imposes fiduciary duties that state law provides the cause of action for. It is a state law breach of fiduciary duty claim regarding -- regarding fiduciary duties imposed as a matter of law by the Investment Advisers Act that is Count One in the District Court action.

Furthermore, that Act does create a private right of action for rescission. That would be rescission of the advisory agreement with the Charitable DAF, not rescission of the HarbourVest settlement.

Second, Your Honor, the notion that this Court has related to jurisdiction is irrelevant and beside the point. I would like to note for the record that the District Court civil cover sheet that omitted to state that this was a related action has been corrected, has been amended, and that that has taken place.

Counsel for the Debtor also appears to agree with us that the order ought to be modified for having asserted exclusive jurisdiction over colorable claims to the extent it's not legally permissible to do. And in trying to invoke the discussions between us as to how the orders might be fixed, what counsel does is tries to cabin the legally-permissible caveat to just the second half of the paragraph at issue. It is both -- both portions, the gatekeeping and the subsequent hearing of the claims, that should be limited to the extent it would be impermissible legally for this Court to make those decisions.

On top of that, Your Honor, merely stating "to the extent legally permissible" would result in a considerable amount of ambiguity in the order that would lead it, I fear, to be unenforceable as a matter of law.

Next, Your Honor, when Debtor's counsel talks about the authority in this case, it feels like we're ships passing in the night. He says that we're wrong in asserting that no case we can find involves both the *Barton* doctrine and the application of the business judgment rule where the Court is asked to defer, and he mentions cases that apply the *Barton* doctrine to an approval rather than an appointment. The Court is asked to --

(Garbled audio.)

THE COURT: I lost you for a moment. Could you

repeat the last 30 seconds?

MR. BRIDGES: Thank you, Your Honor. Yes. He points -- opposing counsel points us to case law where the *Barton* doctrine has been applied despite the Bankruptcy Court having merely approved rather than appointed the trustee or the, I'm sorry, the professional. But in doing so, he doesn't reference any case that has done so in the context of business judgment rule deference. It's like we're ships passing in the night.

What we're saying isn't that a mere approval can never rise to the level of the *Barton* doctrine. What we're saying is that, in combination with the business judgment rule deference, the two cannot go together. There's no authority for saying that they do.

We -- I further feel like we're ships passing in the night when he talks about *Shoaf*. Counsel says that in *Shoaf* there was a confirmed final plan and it specifically identified the released guaranty. And yeah, that distinguishes it from this case, just as it distinguished -- just as the *Applewood Chair* case distinguished it when there's not that specific identification. And here, we don't even have a final plan confirmation at the time these orders are being issued. Without that express -- express notion of what the claims are being discharged, *Shoaf* doesn't apply.

There, there was a guaranty to a party on a specific

indebtedness that was listed, identified with specificity, and disappeared as a result of the judgment, as a result of the judgment in the underlying case. Here, we're talking about any potential claim that might arise in the future. As of the July order's issuance, it didn't apply on its -- either it didn't apply to future claims that had not yet accrued or else in violation of *Applewood Chair*, it was releasing claims without identifying them.

Who does Seery owe a fiduciary duty to? Is it, as Debtor's counsel says, only to the funds and not to the investors, or does he also owe those duties to the investors as well? Your Honor, that is going to be a hotly-contested issue in this litigation, and it involves -- it requires consideration of the Advisers Act and the multitude of accompanying regulations. To just state that his fiduciary duties are limited in a way that couldn't affect anyone that is -- whose claims are precluded by the July order is both wrong on the law and is invoking something that will be a hotly-contested issue that falls under 157(d), where, again, this Court doesn't have the jurisdiction to decide that, other than in a report and recommendation.

The order is legally infirm because it's issued without jurisdiction for doing that as well.

Finally, Your Honor, I think (garbled) wrong direction with a statement that suggests that Mr. Seery is an agent of

the independent directors under the January order. He is, in fact, not an independent agent -- not an agent of any of the independent directors, but, at most, of the company that is controlled by the board, not -- not of individual directors who could confer on him -- who could confer on him any immunity that they have obtained from the January order just by having appointed him.

The proposed order from the other side failed to address either the ambiguity in the order or its attempt to exculpate Mr. Seery from the liability, including liability for which there is a jury trial right, and it is not a fix to the problem for that reason.

In order to make the order enforceable and to fix its infirmities, the Court would have to do significantly more. It would have to both apply the caveat from the final confirmation plan order, rope that caveat to the first part of the relevant paragraph, as well as the second part, and it would have to provide directive clarity to be enforceable rather than too vague.

Your Honor, I think that's all I have.

THE COURT: Okay. Just FYI, my law clerk pulled the *Smyth* case from 21 years ago from the Fifth Circuit. And while it more prominently deals with the issue of whether trustees -- in this case, it was a Chapter 11 trustee -- could be subjected to personal liability for damages to the

bankruptcy estate --

(Echoing.)

THE COURT: Someone, put your phone on mute. I don't know who that is.

It dealt with, you know, the standard of liability, that the trustee could not be sued for matters not to the level of gross negligence.

But it does say, in the very last paragraph, to my shock and amazement, that -- it's just one sentence in a 10-page opinion -- orders appointing counsel -- and it was talking about the trustee's lawyer he hired to handle appeals to the Fifth Circuit -- orders appointing counsel under the Bankruptcy Code are interlocutory and are not generally considered final and appealable. And it cites one case from 1993, the Middle District of Florida. Live and learn. There is one sentence in that opinion that says that. But I don't know that it's hugely impactful here, but I did not know about that opinion and I'm rather surprised.

All right. You were going to walk me through evidence, you said?

MR. BRIDGES: Well, do I -- Your Honor, do you want to do that first before I submit --

THE COURT: Yes, please.

MR. BRIDGES: -- my rebuttal argument?

THE COURT: Please.

MR. BRIDGES: Okay.

THE COURT: Uh-huh.

MR. BRIDGES: Your Honor, we would submit and offer Exhibits 1 through 44, with the exception of those that have been withdrawn, that are 2, 13 --

THE COURT: Okay. Slow down. Slow down. I need to get to the docket entry number we're talking about. Are we talking -- are your -- the Debtor's exhibits are at 2412. But Nate, I misplaced my notes. Where are Charitable DAF and Holdco's?

THE CLERK: I have 2411.

THE COURT: 2411? Is that it?

MR. BRIDGES: 2420, Your Honor.

THE COURT: 2420? Okay. Give me a minute. (Pause.) 2420?

MR. BRIDGES: Yes, Your Honor.

THE COURT: Okay, I'm there. And it's which exhibits?

MR. BRIDGES: It's Exhibits 1 through 44, Your Honor, with four exceptions. We have agreed to withdraw Exhibit 2, 13, 14, and 29.

THE COURT: All right.

MR. BRIDGES: Also, Your Honor, we'd like to submit Debtor's Exhibit 1, which is under Exhibit 49 on our list, would be anything offered by the other side. But we'd like

to make sure that Debtor's Exhibit 1 gets in the record as well.

THE COURT: Let me back up. When I pull up the docket entry you just told me, I have Exhibits 44, 45, and 46 only. Am I misreading this?

MR. BRIDGES: I have a chart showing Exhibits 1 through 49 titled Docket 2420 filed 6/7/21.

THE COURT: Okay. The docket entry number you told me, 2420, it only has three exhibits: 44, 45, and 46. So, first off, I understand -- are you offering 45 and 46 or not?

MR. BRIDGES: No, Your Honor.

THE COURT: Okay. So you said you were offering 1 through 44 minus certain ones. 44 is here.

MR. BRIDGES: Yes.

THE COURT: But I've got to go back to a different docket number.

THE CLERK: It's actually 2411.

THE COURT: It's at 2411. That has all the others?

THE CLERK: Yes.

THE COURT: Okay.

So, Mr. Pomerantz, do you have any objection to Exhibits 1 through 44, which he's excepted out 2, 13, 14, and 29, and then he's added Debtor's Exhibit 1? Any objection?

MR. POMERANTZ: I don't believe so. I just would confirm with John Morris, who has been focused on the

exhibits, just to confirm.

THE COURT: Mr. Morris?

MR. MORRIS: No objection, Your Honor. It's fine.

THE COURT: Okay. They're admitted.

(Movants' Exhibits 1, 3 through 12, 15 through 28, and 30 through 44 are received into evidence. Debtor's Exhibit 1 is received into evidence.)

THE COURT: So, any --

MR. BRIDGES: Thank you, Your Honor.

THE COURT: Anything you wanted to call to my attention about these?

MR. BRIDGES: Your Honor, the things that we mentioned in the argument, for sure, but especially that the word "trustee" is not used in the January hearing's transcript, nor is it under discussion in that transcript that it would be a trustee-like role being played by the Strand directors, as well as the transcript of the July hearing on the order at issue here, Your Honor, where you are asked to defer both in that transcript and in the motion, the motion that was at issue in that hearing, you are asked to defer to the business judgment of the company.

And finally, Your Honor, I'd ask you to look at the allegations in the District Court complaint.

THE COURT: All right.

Mr. Pomerantz or Morris, let's see what exhibits you're

wanting the Court to consider. Your exhibits, it looks like, are at Docket Entry 2412.

MR. MORRIS: As subsequently amended at 2423.

THE COURT: Oh. All right. So which ones are you offering?

MR. MORRIS: We're offering all of the exhibits on 2423, which is 1 through 17.

(Echoing.)

THE COURT: Whoops. We got some distortion there. Say again?

MR. MORRIS: Yeah. All of the exhibits that are on 2423, which are Exhibits 1 through 17. But I want to make sure that, as I did earlier, that that has the exhibits that we're relying on. Does that --

(Pause.)

THE COURT: Okay. Let me make sure I know what's going on here. You're double-checking your exhibits, Mr. Morris?

MR. MORRIS: Yes, Your Honor.

THE COURT: Okay.

(Pause.)

MR. MORRIS: Your Honor, we start with Docket No. 2419, --

THE COURT: Okay.

MR. MORRIS: -- which was the amended exhibit list.

And that actually had Exhibits 1 through 17. And then that was amended at Docket 2423. So, the exhibits on both of those lists.

THE COURT: Well, they're one and the same, it looks like, right?

MR. MORRIS: Yes.

THE COURT: Okay. So you're offering those?

MR. MORRIS: I think -- yeah.

THE COURT: Any objection?

MR. BRIDGES: No objection.

THE COURT: All right. They're admitted.

(Debtor's Exhibits 1 through 17 are received into evidence.)

MR. POMERANTZ: Your Honor, if I may take a few moments to respond to Mr. Bridges' reply?

THE COURT: All right. Is he still within his hour and a half?

THE CLERK: At an hour and one minute.

THE COURT: Okay. All right. You have a little time left, so go ahead.

MR. POMERANTZ: Thank you, Your Honor.

So look, I -- it sort of was really not fair to us. Mr. Bridges was really making things up on the fly. He was changing the theories of his case and responding to Your Honor. But I'm going to do my best to respond to the

arguments made, many of which I sort of anticipated.

I'll first start with the issue that Your Honor raised, which was whether this is under Rule 60 or not. Mr. Bridges identified a couple of cases, said that the order was interlocutory, said that somehow the orders have anything to do with a plan confirmation order. They do not. Your Honor didn't hear that argument at the plan confirmation. The January 9th and July 16th orders are old and cold. There's an exculpation provision in the plan. There's a gatekeeper in the plan. The provisions do not overlap entirely. The gatekeeper applies prospectively. The exculpation provision includes additional parties.

So the arguments that basically the plan had anything to do -- and the fact that the plan is not a final order -- has anything to do with the January 9th and July 16th orders is just wrong. It's just wrong.

More fundamentally, Your Honor, as Your Honor pointed out, the *Smyth* case is a professional employment order. And ironically, if you abide by the *Smyth* case, that order is never appealable because it's interlocutory.

But more fundamentally, Your Honor, that's dealing with 327 professionals. And again, there's not much analysis in the *Smyth* case, but we're not dealing with a 327 professional. We're dealing with orders that were approved under 363.

So the premise of the argument that Rule 60(b) -- 60 doesn't apply and they have other arguments just doesn't make any sense.

Okay. So now that gets us to Rule 60. And Your Honor, Your Honor hit the nail on the head. They haven't presented any evidence. Allegations in a complaint aren't evidence. They can't stand up there and say surprise evidence. They had the opportunity -- and this hearing's been continued a few weeks -- they had the opportunity to bring it up, and it's -- they had the opportunity to claim that there was surprise, but they just didn't. Okay?

So to go on to the Rule 60 arguments. Surprise. Surprise and reasonable delay are really -- go hand in hand with Mr. Bridges' argument. He says, well, we didn't find out that -- months after the order was entered that he violated a duty to us, so we are surprised by that, and it's a reasonable time. Well, Your Honor, the order provided for an exculpation. CLO Holdco and DAF knew that it applied to an exculpation. They were bound. They knew based upon that order that they would not be able to bring claims for normal negligence. There is no surprise.

If you take Mr. Bridges' argument to its conclusion, he could wait until the end of the statute of limitations after an order and have come in four years from now and say, Your Honor, we just found out facts so we should go back four

years before. That, Your Honor, that's not how the surprise works. That's not how the reasonable time works.

Mr. Bridges did not contest that they're bound by res judicata. He did not contest that the exculpation itself was clear and unambiguous. Of course he argued Your Honor couldn't enter an order saying there was exculpation, again, with no authority. And he seemed surprised, as I suspect he should, since he's not a bankruptcy lawyer, that retention orders, whether it's investment bankers, financial advisors, include exculpations all the time. So there's no grounds under surprise.

There's no grounds -- the motions are late under 60(c).

And they're not void. I went through a painstaking analysis, Your Honor, and I described in detail what the *Espinosa* case held, and the exceptional circumstances which Mr. Bridges tried to get away from as much as he could. Maybe he can try to get away from language in a district Court opinion, in a Bankruptcy Court opinion, in a Circuit Court opinion. You can't get away from language in a Supreme Court opinion. The Supreme Court opinion said exceptional circumstances, where there was arguably no basis for jurisdiction for what the Court did. They have not even come close to convincing Your Honor that there was absolutely no basis.

Now, they disagree. We granted, we think it's a good-

faith disagreement, but they haven't come close to establishing the *Espinosa* standard, so their motion under 60 does not -- it fails.

And I don't think -- look, these are good lawyers. Mr. Bridges and Mr. Sbaiti are good lawyers. They didn't just inadvertently not mention Rule 60. They never mentioned it because they knew they had no claim under Rule 60.

Your Honor, Mr. Bridges has made comments about the fiduciary duty of Mr. Seery, about what the Investor's Act provides. He's just wrong on the law. Now, Your Honor doesn't have to decide that. Whichever court adjudicates the DAF lawsuit will have to decide it. But there is no private cause of action for damages. There are no fiduciary duties to the investors.

And what Mr. Bridges doesn't even mention, in that the investment agreement that's so prominent in his complaint, they waived claims other than willful misconduct and gross negligence against Highland. They waived those claims. So for Mr. Bridges to come in here and argue that there's some surprise, when he hasn't even bothered to look at the document that's underlying the contractual relationship between the DAF and the Debtor, is -- you know, I'll just say it's inadvertence.

Your Honor, Mr. Bridges tried to argue that Mr. Seery is not a beneficiary of the January 9th order. He's not an

agent. Well, again, Your Honor, Mr. Bridges wasn't there. Your Honor and we were. On January 9th, an independent board was picked, and at the time Mr. Dondero ceased to become the CEO. So you have three gentlemen coming in -- Mr. Seery, Mr. Dubel, and Mr. Nelms -- coming in to run Highland, in a very chaotic time. They had to act through their agents. There was no expectation that this board was going to actually run the day-to-day operations of the Debtor. Of course not. They needed someone to run. And they picked Mr. Seery. And the argument that well, he's an agent of the company, he's not an agent of the board, that just doesn't make sense. The independent board had to act. The directors had to act. And the directors, how do they deal with that? They acted through Mr. Seery. So he is most certainly governed by the January 9th order.

Your Honor, I want to talk about the jury trial right. Mr. Bridges said that Paragraph 14 is an arbitration clause and not a jury trial waiver. Now, again, I will forgive Mr. Bridges because I assume he didn't read the provision, okay, and he -- somebody told him that, and that person just got it wrong. But what I would like to do is read for Your Honor Paragraph 14(f). It doesn't have to do with arbitration. It's a waiver of jury trial. 14(f), Jurisdiction Venue, Waiver of Jury Trial. The parties hereby agree that any action, claim, litigation, or proceeding of any kind

whatsoever against any other party in any way arising from or relating to this agreement and all contemplated transactions, including claims sounding in contract, equity, tort, fraud, statute defined as a dispute shall be submitted exclusively to the U.S. District Court for the Northern District of Texas, or if such court does not have subject matter jurisdiction, the courts of the State of Texas, City of Dallas County, and any appellate court thereof, defined as the enforcement court. Each party ethically and unconditionally submits to the exclusive personal and subject matter jurisdiction of the enforcement court for any dispute and agrees to bring any dispute only in the enforcement court. Each party further agrees it shall not commence any dispute in any forum, including administrative, arbitration, or litigation, other than the enforcement court. Each party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced through other jurisdictions by suit on the judgment or in any manner provided by law.

And then the kick, Your Honor, all caps, as jury trial waiver always are: Each party irrevocably and unconditionally waives to the fullest extent permitted by law any right it may have to a trial by jury in any legal action, proceeding, cause of action, or counterclaim arising out of or relating to this agreement, including any exhibits, schedules, and appendices attached to this agreement or the transactions contemplated

hereby. Each party certifies and acknowledges that no representative of the owner of the other party has represented expressly or otherwise that the other party won't seek to enforce the foregoing waiver in the event of a legal action. It has considered the implications of this waiver, it makes this waiver knowingly and voluntarily, and it has been induced to enter into this agreement by, among other things, the mutual waivers and certifications in this section.

Your Honor, I will forgive Mr. Bridges. I assume he just did not read that. But to represent to the Court that that language does not contain a jury trial waiver is -- is just wrong.

THE COURT: All right. I'm going to stop right there. And you were reading from the Second Amended and Restated Shared Services Agreement between Highland --

MR. POMERANTZ: Not shared services. I'm reading from the Second Amended and Restated Investment Advisory Agreement --

THE COURT: Investment --

MR. POMERANTZ: -- between the Charitable DAF, the Charitable DAF GP, and Highland Capital Management. The agreement whereby the Debtor was the investment advisor to the Charitable DAF Fund and the Charitable DAF GP.

THE COURT: All right. Well, Mr. Bridges, I'm going to bounce quickly back to you. This is your chance to defend

your honor.

MR. BRIDGES: Yeah, we're -- we're looking at a different agreement, where -- where literally the words that were read to you are not in the agreement in front of us and it is news to me. So, Your Honor, this is a problem --

THE COURT: What is the agreement you're looking at?

MR. BRIDGES: It is the Amended -- I assume that means First Amended -- Restated Advisory Agreement.

MR. POMERANTZ: Your Honor, we are happy to file this agreement with the Court so the Court has the benefit of it in connection with Your Honor's ruling.

THE COURT: Okay. I would like you to do that. Uh-huh.

MR. BRIDGES: I'd like -- I'd like to request -- I'll withdraw that.

THE COURT: Okay. Go on, Mr. Pomerantz.

MR. POMERANTZ: Mr. Bridges, if you could put us on mute. If you could put us on mute, Mr. Bridges, so I don't hear your feedback. Thank you.

Mr. Bridges also complains about the language "to the extent permissible by law." As Your Honor knows and as has been my practice over 30 years, that language is probably in every plan where there's a retention of jurisdiction: to the extent permissible by law. And Mr. Bridges says that this will create ambiguity in the order that couldn't be enforced.

There's no basis for that. Our including the language "to the extent permissible by law" in the orders, as we are prepared to do, is consistent with the plan confirmation order where we addressed that issue. And we addressed that issue because we didn't want to put Your Honor in a position where thereby Your Honor may have an action before Your Honor that passes the colorability gate that Your Honor may not be able to assert jurisdiction. And since jurisdiction can't be waived in that regard, we will agree to amend that.

There's nothing ambiguous about that, and there's no reason, though, that clause has to modify the Court's ability to act as a gatekeeper, because, as we've argued *ad nauseam*, gatekeeper provisions where the Court has that ability is not only part of general bankruptcy jurisprudence but also part of the Bankruptcy Code.

Counsel says that *Barton* doesn't apply because the business judgment of Your Honor was used in retaining Mr. Seery as opposed to in some other capacity. There's no basis for that, Your Honor. A court-appointed -- a court-approved CEO, CRO, professional, they are all entitled to protection under the *Barton* act. And the argument -- and again, this is separate and apart from whether he's entitled to protection under the January 9th order. But the argument that because it was the business judgment -- again, business judgment in doing something that Your Honor expressly contemplated under the

January 9th corporate governance order -- there's just no law to support that. And I guess he's trying to get around the plethora of cases that deal with the situation where *Barton* has been extended.

Your Honor, Mr. Bridges, again, in arguing that we're ships passing in the night on *Shoaf* and *Applewood* and *Espinosa*, no, we're not ships passing in the night. We have a difference in agreement on what these cases stand for. These cases stand for the proposition that a clear and unambiguous provision, plain and simple, if it's clear and unambiguous, it will be given res judicata effect. The release in *Shoaf*, clear and unambiguous. The release in *Applewood*, not. The issue here is the exculpation language. That was clear and unambiguous. It applied prospectively. The argument makes no sense that we didn't identify -- we didn't identify claims that might arise in the future, so therefore an exculpation clause doesn't apply? That doesn't make any sense.

Your Honor clearly exculpated parties. Mr. Dondero knew it. CLO Holdco knew it. The DAF knew it. So the issue Your Honor has to decide is whether that exculpation was a clear and unambiguous provision such that it should be entitled to res judicata effect. And we submit that the answer is unequivocally yes.

That's all I have, Your Honor.

THE COURT: All right. Well, --

MR. MORRIS: Your Honor? I apologize.

THE COURT: Okay.

MR. MORRIS: This is John Morris.

THE COURT: Yes?

MR. MORRIS: I just want to, with respect to the exhibits, I know there was no objection, but I had cited to Docket Nos. 2419 and 2423. The original exhibit list is at Docket No. 2412. So it's the three of those lists together. 2412, as amended by 2419, as amended by 2423. Thank you very much.

THE COURT: All right. Thank you. All right.

MR. BRIDGES: Your Honor, I still have no objection to that, but may I have the last word on my motion?

THE COURT: Is there time left?

THE CLERK: Yes.

THE COURT: Okay. Go ahead.

MR. BRIDGES: I just need a minute, Your Honor. They agreed to change the order. They proposed it to us. They proposed it in a proposed order to you. They can't also say that it cannot be changed.

Secondly, Your Honor, in *Milic v. McCarthy*, 469 F.Supp.3d 580, the Eastern District of Virginia points out that the Fourth Circuit treats appointment of estate professionals as interlocutory orders as well.

That's all. Thank you, Your Honor.

THE COURT: All right. Here's what we're going to do. We've been going a very long time. I'm going to take a break to look through these exhibits, see if there's anything in there that I haven't looked at before and that might affect the decision here. So we will come back at 3:00 o'clock Central Time -- it's 2:22 right now -- and I will give you my bench ruling on this. All right.

So, Mike, they can all stay on the line, right?

Okay. You can stay on, and we'll be back at 3:00 o'clock.

THE CLERK: All rise.

(A recess ensued from 2:22 p.m. to 3:04 p.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated. All right. Everyone presented and accounted for. We're going back on the record.

MR. POMERANTZ: Your Honor, before you start, this is Jeff Pomerantz. We had sent to your clerk, and hopefully it got to you, a copy of the Second Amended and Restated Investment Advisory Agreement. We also copied Mr. Sbaiti with it as well. And we would also like to move that into evidence, just so that it's part of the Court's record.

THE COURT: All right.

MR. BRIDGES: We would object to that, Your Honor. We haven't had an opportunity to even verify its authenticity yet.

THE COURT: All right. Well, I'll tell you what. I'm going to address this in my ruling. So it's not going to be part of the record for this decision, and yet -- well, I'll get to it.

All right. So we're back on the record in Case Number 19-34054, Highland Capital. The Court has deliberated, after hearing a lot of argument and allowing in a lot of documentary evidence, and the Court concludes that the motion of CLO Holdco, Ltd. and The Charitable DAF to modify the retention order of James Seery, which was entered almost a year ago, on July 16th, 2020, should be denied.

This is the Court's oral bench ruling, but the Court reserves discretion to supplement or amend in a more fulsome written order what I'm going to announce right now, pursuant to Rule 7052.

First, what is the Movants' authority to request the modification of a bankruptcy court order that has been in place for so many months, which was issued after reasonable notice to the Movants, and after a hearing, which was not objected to by the Movants, or appealed, when the Movants were represented by sophisticated counsel, I might add, and which order was relied upon by parties in this case, most notably Mr. Seery and the Debtor, and in fact was entered after significant negotiations involving a sophisticated court-appointed Unsecured Creditors' Committee with sophisticated

professionals and sophisticated members, and after negotiation with an independent board of directors, court-appointed, one of whose members is a retired bankruptcy judge? What is the Movants' authority?

Movants fumbled a little on that question, in that the exact authority wasn't set forth in the motion. But Movants' primary argument is that Movants think the Seery retention order was an interlocutory order and that the Court simply has the inherent authority to modify it as an interlocutory order.

The Court disagrees with this analysis. I do not think the Fifth Circuit's *Smyth* case dictates that the Seery retention order is still interlocutory. The Seery retention order was an order entered pursuant to Section 363 of the Bankruptcy Code, not a Section 327 professionals to a debtor-in-possession, professionals to a trustee employment order such as the one involved in the *Smyth* case.

But even if the Seery retention order is interlocutory -- the Court feels strongly that it's not, but even if it is -- the Court believes it would be an abuse of this Court's inherent discretion or authority to modify that order almost a year after the fact and under the circumstances of this case.

Now, assuming Rule 60(b) applies to the Movants' request, the Court determines that the Movants have not made their motion anywhere close to within a reasonable time, as Rule 60(c) requires, nor do I think the Movants have demonstrated

any exceptional circumstances to declare the order or any of its provisions void. The Movants have put on no evidence that constitutes surprise or constitutes newly-disputed evidence. So why are there no exceptional circumstances here such that the Court might find, you know, a void order or void provisions of an order?

First, this Court concludes that there's no credible argument that the Court overreached its jurisdiction with the gatekeeping provisions in the order. Gatekeeping provisions are not only very common in the bankruptcy world -- in retention orders and in plan confirmation orders, for example -- but they are wholly consistent with the *Barton* case, the U.S. Supreme Court's *Barton's* case, and its progeny that has become known collectively as the *Barton* doctrine. Gatekeeping provisions are wholly consistent with 28 U.S.C. Section 959(a)'s complete language.

The Fifth Circuit has blessed gatekeeping provisions in all sorts of contexts. It has blessed them in the situation of when *Stern* claims are involved in the *Villegas* case. It even blessed Bankruptcy Courts' gatekeeping functions a long time ago, in 1988, in a case that I don't think anyone mentioned in the briefing, but as I've said, my brain sometimes goes down trails, and I'm thinking of the *Louisiana World Exposition* case in 1988, when the Fifth Circuit blessed there a procedure where an unsecured creditors' committee can

bring causes of action against persons, such as officers and directors or other third parties, if they first come to the Bankruptcy Court and show a colorable claim. They have to come to the Bankruptcy Court, show they have a colorable claim and they're the ones that should be able to pursue them. Not exactly on point, but it's just one of many cases that one could cite that certainly approve gatekeeper functions of various sorts of Bankruptcy Courts.

It doesn't matter which court might ultimately adjudicate the claims; the Bankruptcy Court can be the gatekeeper.

And the Court agrees with the many cases cited from outside this circuit, such as the case in Alabama, in the Eleventh Circuit, and there was another circuit-level case, at least one other, that have held that the *Barton* doctrine should be extended to other types of case fiduciaries, such as debtor-in-possession management, among others.

Finally, as I pointed out in my confirmation ruling in this case, gatekeeping provisions are commonplace for all types of courts, not just Bankruptcy Courts, when vexatious litigants are involved. I have commented before that we seem to have vexatious litigation behavior with regard to Mr. Dondero and his many controlled entities.

Now, as far as the Movants' argument that there was not just improper gatekeeping provisions but actually an improper discharge in the Seery retention order of negligence claims or

other claims that don't rise to the level of gross negligence or willful misconduct, again, I reiterate there's nothing exceptional in the bankruptcy world about exculpation provisions like this. They absolutely are a term of employment very often. Just like compensation, they're frequently requested, negotiated, and approved. They are normal in the corporate governance world, generally. They are normal in corporate contracts between sophisticated parties. And most importantly of all, even if this Court overreached with the exculpation provisions in the Seery retention order, even if it did, res judicata bars the attack of these provisions at this late stage, under cases such as *Shoaf*, *Republic Supply v. Shoaf* from the Fifth Circuit, the *Espinosa* case from the U.S. Supreme Court, and even *Applewood*, since the Court finds the language in this order was clear, specific, and unambiguous with regard to the gatekeeping provisions and the exculpation provisions.

Last, and this is the part where I said I'm going to get to this agreement that has been submitted, the Second Amended and Restated Investment Advisor Agreement or whatever the title is. I am more than a little disturbed that so much of the theme of the Movants' pleadings and arguments, and I think even representations to the District Court, have been they have these sacred jury trial rights, these inviolate jury trial rights, and an Article I Court like this Court should

have no business through a gatekeeping provision impinging on the possible pursuit of an action where there's a jury trial right.

I was surprised initially when I thought about this. I thought, wow, I've seen so many agreements over the months. I can't say every one of them waived the jury trial right, but I just remembered seeing that a lot, and seeing arbitration provisions, and so that's why I asked. It just was lingering in my brain. So I'm going to look at what is submitted. I'm not relying on that as part of my ruling. As you just heard, I had a multi-part ruling, and whether there's a jury trial right or not is irrelevant to how I'm choosing to rule on this motion. But I do want to see the agreement, and then I want Movants within 10 days to respond with a post-hearing trial brief either saying you agree that this is the controlling document or you don't agree and explain the oversight, okay? Because it feels like a gross omission here to have such a strong theme in your argument -- we have a jury trial right, we have a jury trial right, by God, the gatekeeping provisions, among other things, impinge on our sacred pursuit of our jury trial right -- and then maybe it was very conspicuous in the controlling agreement that you'd waived that, the Movants had waived that.

So, anyway, I'm requiring some post-hearing briefing, if you will, on whether omissions, misrepresentations were made

to the Court.

Anyway, so I reserve the right to supplement or amend this ruling with a more fulsome written order. I am asking Mr. Pomerantz to upload a form of order that is consistent with this ruling, and --

MR. POMERANTZ: Your Honor, we will do so. I do have one thing to bring to the Court's attention, unrelated to the motion, before Your Honor leaves the bench.

THE COURT: All right. So just a couple of follow-up things. Have you -- I'm not clear I heard what you said about this agreement. Did you email it to my courtroom deputy or did you file it on the docket?

MR. POMERANTZ: We emailed it to your courtroom deputy. We're happy to file it on the docket. And we also provided a copy to Mr. Sbaiti.

I would note for the Court that it's signed both by The Charitable DAFs by Grant Scott, just for what it's worth.

THE COURT: Okay. All right. Well, I'm trying to think what I want -- I do want you to file it on the docket, and I'm trying to think of what you label it. Just call it Post-Hearing Submission or something and link it to the motion that we adjudicated here today. And then, again, you've got 10 days, Mr. Bridges, to say whatever you want to say about that agreement.

I guess the last thing I wanted to say is we sure devoted

a lot of time to this motion today. We have -- this is a recurring pattern, I guess you can say. We have a lot of things that we devote a lot of time to in this case that I get surprised, but it is what it is. You file a motion. I'm going to give it all the attention Movants and Respondents think it warrants. I'm going to develop a full record, because, you know, there's a recurring pattern of appeals right now, 11 or 12 appeals, I think, not to mention motions to withdraw the reference. If we're going to have higher courts involved in the administration of this case, I'm going to make a very thorough record so nobody is confused about what we did, what I considered, what my reasoning was.

So I kind of think it's unfortunate for us to have to spend case resources and so much time and fees on things like this, but I'm going to make sure a Court of Appeals is not ever confused about what happened and what we did. So that's just the way it's going to be. And I feel like we have no choice, given, again, the pattern of appeals.

All right. So, with that, Mr. Pomerantz, you had one other case matter, you said?

MR. POMERANTZ: Yes. But before I get to that, Your Honor, I assume that, in response to the Movants' submission on the agreement, that we would have right at four or seven days to respond if we deem it's appropriate?

THE COURT: I think that's reasonable. That's

reasonable.

MR. POMERANTZ: Okay. Thank you, Your Honor.

THE COURT: So let me think of how I want to do this. I'll just do a short scheduling order of sorts that just, it says in one or two paragraphs, at the hearing on this motion, the Court raised questions about the jury trial rights and the Debtor has now submitted the controlling agreements, I'm giving the Movants 10 days to respond to whether this is indeed a controlling agreement, and why, if it is, the Movants have heretofore taken the position they have jury trial rights. And then I will give you seven days thereafter to reply, and then the Court will set a further status conference if it determines it's necessary. Okay?

So, Nate, we'll do a short little order to that effect. Okay?

MR. POMERANTZ: Thank you, Your Honor.

I -- again, before I raise the other issue, I want to pick up on a comment Your Honor just made towards the end. I know the Court has been frustrated with the time and effort we've been spending. The Debtor and the creditors have been extremely frustrated, because in addition to the time and effort everyone's spending, we're spending millions of dollars, millions of dollars on litigation that --

THE COURT: It's one of the reasons you needed an exit loan, right?

MR. POMERANTZ: Right. No, exactly. That's frivolous, that we think is made in bad faith.

And Your Honor, and everyone else who's hearing this on behalf of Mr. Dondero, should understand we're looking into what appropriate authority Your Honor would have to shift some of the costs. Your Honor did that in the contempt motion. Your Honor can surely do that in connection with the notes litigation. But all this other stuff that is requiring us to spend hundreds and hundreds of hours and spend millions of dollars, we are clearly looking into whether it would be appropriate and what authority there is. I just wanted to let Your Honor know that.

And in connection with that, the last point, Your Honor, I can't actually even believe I'm saying this, but there was another lawsuit filed -- we just found out in the break -- on Wednesday night by the Sbaiti firm on behalf of Dugaboy in the District Court.

Now, to make matters worse, Your Honor, the litigation relates to alleged improper management by the Debtor of Multi-Strat. If Your Honor will recall, at many times I've told this Court what Dugaboy's claims they filed in this case. Dugaboy has a claim that is filed in this case for mismanagement postpetition of Multi-Strat. Now the Sbaiti firm, in addition to representing CLO Holdco, in addition to representing the DAF, and whatever the Plaintiffs' lawyers are

in that other District Court, PCMG, and in connection with the Acis matter, they've decided they haven't had enough. They've now filed another motion that -- you know, why they filed it in District Court and there's a proof of claim on the same issues, I don't know. But I thought Your Honor should know. I'm not asking Your Honor to do anything about it. But we will act aggressively, strongly, and promptly.

Thank you, Your Honor.

THE COURT: All right. Well, you've reminded me of what came out earlier today about the entity -- I left my notepad in my chambers -- PMC or PMG or something.

Mr. Bridges, we're not going to have a hearing right now on me doing anything, but what are you thinking? What are you doing?

MR. BRIDGES: Your Honor, I'm not trying to duck your question. I literally have no involvement with any other claim, and we would have to ask Mr. Sbaiti to answer your questions.

THE COURT: All right. Is he there?

MR. BRIDGES: He is.

THE COURT: I'll listen.

MR. BRIDGES: I'll switch seats and give him this chair.

MR. SBAITI: Sorry, Your Honor. We had two computers going and weren't able to use the sound on one, so we ended up

turning that off.

Your Honor, I'm not sure what the question is about when you say what are we thinking. We have a client that's asked us to file something, and when we're advised by bankruptcy counsel that it's not prohibited for us to do so, and don't know why we're precluded from doing so, and when the time comes I'm sure we'll be able to explain to Your Honor -- someone will be able to explain to Your Honor why what we're doing, despite Mr. Pomerantz's exacerbation, or excuse me, exasperation, why that wasn't improper. It's our belief that it wasn't improper or a violation of the Court's rule.

THE COURT: Just give me a quick shorthand *Readers' Digest* of why you don't think it's improper.

MR. SBAITI: Sure. My understanding is, Your Honor, there's not a rule that says we can't file it against the Debtor for postpetition actions. So that, that's as -- that's as much as I understand. And I'm going to -- I'm not trying to duck it, either. And if I'm wrong about that and someone wants to correct me on our side offline and if we have to explain to the Court why that's so or what rule has been violated, I'm sure we'll be able to put together something for that. But that's what I've been advised.

THE COURT: Have you done thorough --

MR. POMERANTZ: Your Honor, I think what --

MR. SBAITI: (garbled), Your Honor.

THE COURT: Have you done thorough research yourself? Your Rule 11 signature is on the line, not some bankruptcy counsel you talked to. Have you done the research yourself?

MR. SBAITI: Well, Your Honor, I've relied on the research and advice of people who are experts, and I believe my Rule 11 obligations also allow me to do that, so yes.

MR. POMERANTZ: Your Honor, I think we're entitled to know if it's Mr. Draper's firm who has been representing Dugaboy. He's the bankruptcy counsel. I don't think it's an attorney-client privilege issue. If Mr. Sbaiti is going to be here and sort of say, hey, bankruptcy counsel said it was okay, I think we would like to know and I'm sure Your Honor would like to know who is that bankruptcy counsel.

THE COURT: Yes. Fair enough. Mr. Sbaiti?

MR. SBAITI: Your Honor, in consultation with Mr. Draper and with consultation with other counsel that we've spoken to, that has been our understanding.

THE COURT: Who's the other counsel?

MR. SBAITI: Well, we've talked to Mr. Rukavina about some of these things for the PCMG and the Acis case. We've talked to the people who, when they tell us you can't do this because they're bankruptcy counsel for our client, then we don't do something. So, and I'm not trying to throw anybody under the bus, but my understanding of what goes on in Bankruptcy Court is incredibly limited, so, you know, and if

it's a mistake then I'll own it, if I have a mistaken understanding, but I also wasn't anticipating having to make a presentation about this right here right now, so --

THE COURT: Well, you're filing lawsuits that involve this bankruptcy case during the hearing, so --

MR. SBAITI: Oh, we didn't file it during the hearing, Your Honor. It was filed last night, I believe.

THE COURT: Okay. Well, I assume that you're going to go back and hit the books, hit the computer, and be prepared to defend your actions, because your bankruptcy experts, they may think they know a lot, but the judge is not very happy about what she's hearing.

MR. POMERANTZ: Your Honor, if I may ask when Your Honor intends to issue the contempt ruling in connection with the June 8th hearing? I strongly believe -- and, obviously, this has nothing to do with the contempt hearing; this happened after -- but I strongly believe that sending a message that Your Honor is inclined to hold counsel in contempt, which obviously is one of the violators we said should be held in contempt, it may be important to do that sooner rather than later so that people know that Your Honor is serious.

THE COURT: All right. Well, I understand and respect that request. And let me tell you all, I had a seven-day -- okay. You all were here on that motion June 8th. I

had a seven-day, all-day, every-day, 9:00 to 5:00, 45-minute lunch break, in-person hearing with a dozen or so live witnesses that I just finished Tuesday at 5:00 o'clock. So you all were here on the 8th, and then -- what day was that -- what was -- Tuesday, I finished. Tuesday was the 22nd. So I started on the 14th, okay? So you all were here on the 8th and I had a live jury trial -- I mean, not jury trial, a live bench trial -- live human beings in the courtroom, beginning June 14th. So you're here the 8th. June 14th through 22nd, I did my trial. And here we are on the 25th. And guess what, I have another live human-being bench trial next week, Monday through Friday.

So we've been working in other things like this in between those two. So I'm telling you that not to whine, I'm just telling you that, that's the only reason I didn't get out a quick ruling on this, okay?

MR. POMERANTZ: And Your Honor, I was not at all making that comment to imply anything about the Court.

THE COURT: Well, --

MR. POMERANTZ: The time and effort that you have given to this case is extraordinary, --

THE COURT: Okay.

MR. POMERANTZ: -- so please don't misunderstand my comment.

THE COURT: Okay. And I didn't mean to express

annoyance or anything like that. I guess what I'm trying to do is I don't want anyone to mistake the delay in ruling on the contempt motion to mean I'm just not that -- you know, I'm not prioritizing it, other things are more serious to me or important to me, or I'm going to take two months to get to it. It's literally been I've been in trial almost all day long every day since you were here. But trust me, I'm about as upset as upset can be about what I heard on June 8th, and I'm going to get to that ruling, and I know what I'm going to do. And, well, like I said, it's just a matter of figuring out dollars and whom, okay? There's going to be contempt. I just haven't put it on paper because I've been in court all day and I haven't come up with a dollar figure. Okay?

So I hope -- I don't know if that matters very much, but it should.

All right. We stand adjourned.

(Proceedings concluded at 3:35 p.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **06/29/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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Excerpt

11:33 a.m. to 3:35 p.m.

EXHIBIT 22

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE:	Case No. 19-34054-11(SGJ)
HIGHLAND CAPITAL MANAGEMENT, L.P.,	
Debtor.	
	Adv. No. 21-03067(SGJ)
CHARITABLE DAF FUND, LP, et al.,	
Plaintiffs,	Earle Cabell Federal Building 1100 Commerce Street
v.	Dallas, Texas 75242
HIGHLAND CAPITAL, MANAGEMENT, L.P., et al.,	
Defendants.	Tuesday, November 23, 2021 9:40 a.m.

TRANSCRIPT OF HEARING ON
PLAINTIFFS' MOTION TO STAY ALL PROCEEDINGS (55);
PLAINTIFFS' MOTION TO STRIKE REPLY APPENDIX (47); AND
DEFENDANTS' MOTION TO DISMISS COMPLAINT (26)

BEFORE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT JUDGE

TELEPHONIC APPEARANCES CONTINUED ON NEXT PAGE.

Audio Operator: Hawaii S. Jeng

Proceedings recorded by electronic sound recording, transcript produced by a transcript service.

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THE COURT: Good morning. Please be seated.

All right. We have a setting in the Charitable DAF Fund, et al., v. Highland, Adversary 21-3067. We have three motions that are set.

Let me get appearances from the Plaintiffs' counsel first. Go ahead.

MR. SBAITI: Good morning, Your Honor. This is Mazin Sbaiti for the Plaintiffs.

THE COURT: Okay. Thank you.

Now for the Defendants, who do we have appearing?

MR. POMERANTZ: Good morning, Your Honor. It's Jeff Pomerantz and John Morris from Pachulski Stang Ziehl & Jones. Your Honor, before -- I understand Your Honor is going to take up the motion to stay first.

Before Your Honor does so, I have a procedural issue relating to that motion that I would like to address the Court after appearances are made.

THE COURT: All right. I assume that's all the lawyer appearances for this adversary.

MR. JORDAN: Your Honor?

THE COURT: Oh, go ahead.

MR. JORDAN: Your Honor, we are a nominal defendant, but John Jordan on behalf of Highland CLO Funding, Ltd.

THE COURT: Okay. Thank you. Sorry about that.

MR. BESSETTE: And, Your Honor, Paul Bessette, Mr.

Jordan's colleague is on the phone, as well.

THE COURT: Okay. Thank you.

All right. Anyone else I missed?

(No audible response)

THE COURT: All right. Mr. Pomerantz, your procedural issue?

MR. POMERANTZ: Thank you, Your Honor.

Your Honor, I must once again bring to this Court's attention a violation of the Court Rules by the various counsel representing Mr. Dondero. This time it's by Mr. Sbaiti.

When the district court entered its order granting Highland's motion to enforce the reference and referring this matter to Your Honor, there were three matters on the Court's docket, district court's docket that got transferred. First was the motion to dismiss, second was the motion to stay, and third was the motion to strike, which essentially has been rendered moot.

The briefing was complete with respect to the first two matters, the motion to dismiss and the motion to stay. And all that remained for the Court to do was to set a hearing and have oral argument. Your Honor, on October 13th, Your Honor set a hearing for today for each of those two motions. Nevertheless, on November 10th, almost a month after the Court set the matters for hearing and after pleadings were closed, Plaintiffs filed what they called their amended motion to stay.

As an initial matter, Your Honor, the amended motion was not even filed in this adversary proceeding initially. It was filed in the main case, and there was an error that Mr. Sbaiti corrected on November 18th, five days before this hearing. Plaintiff did not ask for leave of court to file any further pleadings. They did not provide the time under the local rules for response. And, in fact, they raised additional arguments in their amended motion.

Well, Your Honor, we can certainly argue to the Court that the amended motion constitutes a new motion, is untimely, and the hearing should be continued to allow us to file a response. We're not going to do that, Your Honor. As I will discuss when it's my time to response substantively to the motion, the new arguments to stay the proceedings, the amended motion are equally as frivolous as the arguments contained in the original motion.

But I bring this to the Court's attention because, again, it's extremely frustrating to have the lawyers representing Mr. Dondero's related entities continue to act as if the rules do not apply to them. Your Honor will recall just a week or so ago, Your Honor made a -- we had a similar issue in connection with the motion to dismiss. Failure to follow the rules is unprofessional, and it's disrespectful not only to Highland's professionals but also to the Court and it interferes with Your Honor's ability to control your docket and

sufficiently prepare for contested matters.

At some point, Your Honor, there should be real consequences for the continued violation of the rules. Having said that, Your Honor, we are prepared to go forward with the motion to stay today.

THE COURT: All right. Mr. Sbaiti, what say you? I'm looking at Docket Entry Number 69 in the adversary proceeding that was filed last Thursday. So, obviously, very, very late in the game, shall we say. What is your response to this?

MR. SBAITI: Your Honor, that was not filed in the adversary as an error. When we asked one of our paralegals to file it, we're not as familiar with the bankruptcy court system and it was an error. It was corrected once the lawyers realized it, which was last -- which was on November the 18th. It was filed in, I guess in the main case. But it was simply an inadvertent error, Your Honor.

MR. POMERANTZ: I would add, Your Honor, the original motion filed inadvertently was November 10th. It still was not timely. I think Mr. Sbaiti needs to answer the question of why that was filed untimely, okay.

THE COURT: All right. Thank you, Mr. Sbaiti.

So, one of my pet peeves in life is people blaming paralegals, by the way. But be that as it may, as Mr. Pomerantz points out that it was still untimely the motion

filed in the underlying bankruptcy case November 10th. So what is your --

MR. SBAITI: Your Honor, when we looked at the motion and looked at the progression of the case, we filed an amended motion simply to clarify our position. And really I don't think we've changed our arguments all that much. We simply clarified our position. We've seen amended motions filed in the bankruptcy in our prior dealings, and so at that point, we felt like there wasn't a rule explicitly saying we couldn't have an amended motion.

But if it's untimely, Your Honor, you know, we don't think it changes the underlying arguments. As Mr. Pomerantz said, we don't think there's any prejudice to Highland either.

THE COURT: All right. Well, just to be clear, you know, it's one thing in an underlying bankruptcy case to file an amended motion after you've gotten a motion set for hearing that might slightly adjust, you know, facts or relief sought. And, of course, we independently look at it when it happens in an underlying case to see do we need more notice to affected parties.

But in an adversary proceeding, you know, you just don't do this. All right? If you have some sort of exceptional circumstances, you can file I guess a motion to amend because I got to include this new information that didn't exist. But you just don't do this, okay?

So I don't -- could you be clear what was the new information? What was the new information that had to be brought before the Court suddenly?

MR. SBAITI: Your Honor, there wasn't new information. We were simply giving notice of our understanding of where the legal arguments were going. The reason being is that after those motions were filed and recently, the debtor took the position in two other cases that they should be dismissed pursuant to the permanent injunction.

And so that clarified for us at least a couple of arguments that were unclear to us where the debtor stood on whether or not the permanent injunction would be a basis to dismiss or stay any of the claims that were pending. There are two other claims pending in district court. Since we had filed that motion, the debtor filed a motion to reconsider the stays that were granted in those two courts. And then they also moved to dismiss on the basis of the permanent injunction.

And so given that the debtor took the position that they were willing to dismiss those cases based upon the permanent injunction, it in many ways contravenes the position they took in response to our motion which is that the -- for example, they somewhat take the position in Paragraph 22, it wasn't as clear then but it's clear -- it seems clearer now that the permanent injunction is not relevant to whether or not the case can go forward in any capacity.

And so we simply wanted to incorporate that, but it's mainly legal argument about the choices that are before the Court. That was really it. I mean, theoretically, I would have made them for the first time during oral argument and we thought we were doing something good by giving -- apprising the Court in writing and giving notice of these arguments to the other side by filing an amended motion. We didn't add new evidence or anything like that.

MR. POMERANTZ: Your Honor, that argument is completely disingenuous because our motion to dismiss and motion for reconsideration that Mr. Sbaiti refers to is several weeks ago, okay. It wasn't November 10th. It was several weeks ago.

I will respond substantively why Mr. Sbaiti is wrong and there's no inconsistent positions when it's my time to speak. But for Mr. Sbaiti to say he was doing us a favor and he was reacting to recent new information is just wrong, Your Honor. And they should just not be continued to allowed to get away with flouting the rules.

THE COURT: All right. Well, let me just say I'm confused, maybe I should say baffled, about this amended motion. You know, the motion to dismiss that is before the Court for oral argument today isn't about the injunction, isn't about the plan injunction. It's about res judicata and other 12(b)(6) arguments.

So I'm confused and I think, you know, it's been clear for many months in this adversary proceeding, in particular, the debtor's position on the plan injunction, particularly, you know, in the whole argument on the motion to leave to add Mr. Seery as a defendant.

So I'm confused, but we're going to go forward on the argument today, whatever argument you want to make. And you've been, I guess, forewarned. I will say that these last-minute amended motions are not going to be tolerated, are not going to be considered. And so, you know, I hope you won't do it again. Your firm has already been sanctioned once in this adversary proceeding. I'm sure we all remember.

So, you know, I'm just kind of baffled why you would take a chance filing an amended motion without leave or somehow getting it to the attention of the Court or running it by the other parties for their consent to you doing it. But we're going to go forward and just hear the arguments, okay. And so --

MR. SBAITI: Thank you.

THE COURT: -- I'll hear your argument.

I'm letting people know I don't know where this time estimate came on the calendar today, three hours. I don't know if someone specifically expressed that. But I'm letting you know at noon I have a swearing-in ceremony that I'm doing back in my chambers. So I will stop at noon Central time.

And so does anyone think that's going to be a problem?

MR. SBAITI: It should not be, Your Honor, from our perspective.

THE COURT: Mr. Pomerantz?

MR. POMERANTZ: I don't believe so. Mr. Morris is going to handle the motion to dismiss which is going to be the bulk. My presentation on the motion to stay is only going to be around ten minutes or so.

THE COURT: Okay. Thank you.

Mr. Sbaiti, your argument on the motion for stay.

MR. SBAITI: Thank you, Your Honor.

Your Honor, may I share my screen?

THE COURT: You may.

MR. SBAITI: I have a PowerPoint that can kind of --

THE COURT: Okay. You may.

MR. SBAITI: -- walk us through. Thank you.

Is Your Honor able to see my screen?

THE COURT: I can, yes.

MR. SBAITI: Thank you, Your Honor.

Your Honor, what I would point you to is, first, the injunction language. This is what Your Honor's permanent injunction says, and this is really what animates our motion to stay. Out motion to stay is derived specifically because my clients and I feel like our case has been enjoined by this

injunction, if not completely disposed of.

The language says that we're an enjoined:

"An enjoined party is permanently enjoined from commencing, conducting, or continuing in any manner any suit, action, or other proceeding of any kind including any proceeding in a judicial, arbitral, administrative, or other forum against or affecting the debtor or the property of the debtor."

And then (v) of that injunction says:

"or acting or proceeding in any manner in any place whatsoever that does not conform to or comply with the provisions of the plan."

One of the things that was suggested in Paragraph 22 of their response was that the DAF and Holdco are not enjoined parties. But the final plan defines an enjoined party in Article 1(b)(56) as any entity who has or -- all entities who have held, hold, or may hold claims against the debtor; any entity that has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 case regardless of the capacity in which such entity appeared and any other party in interest. And, five, the related persons of each of the foregoing.

Article 1(b)(22) defines a claim as any claim that's defined in Section 1015 of the Bankruptcy Code. And Section 1015 of the Bankruptcy Code defines a claim as a right to

payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

So given this definition, when we've read this injunction, we believed that we were enjoined parties, the DAF and Holdco were both enjoined parties. They had appeared in the -- they have claims. Obviously, those are the claims being asserted here.

And so going back to the injunction language, we believe this lawsuit has been disposed of by this permanent injunction. We believe there's really only one or two things that should probably happen with this lawsuit. Either it could be dismissed based upon the permanent injunction or what we proposed in our motion to stay is that the Court exercise its inherent authority to simply stay the case pending the appeal of this language, which is up on appeal in the Fifth Circuit right now.

If that language, and if the injunction gets affirmed by the Fifth Circuit, then certainly the dismissal can happen once that affirmance happens and there's no harm, no foul, and no one's wasted any time.

If they're not, if it's overturned, then, obviously, the injunction would be vacated, presumably by the Fifth Circuit. And at some point, if the Court decides not to enter

a similar injunction that would likewise dispose of this case, then the case could proceed on the merits.

The issue we've identified both in our original motion and as we fleshed out in our -- as a matter of law in our amended motion to simply put a finer point on it is that the merits are now -- have been disposed of. This injunction ends this case, at least as far as we read it. It ends this case irrespective of the underlying merits of the lawsuit, which means that the lawsuit merits themselves have become moot and any opinion or any attempt to resolve it is obviously an advisory opinion by the Court.

So we really only see two ways that this could go right now without either gutting the injunction or circumventing it completely, which is to say that either the case should be dismissed based upon the permanent injunction or the case should be stayed based upon the permanent injunction.

Mr. Pomerantz or the debtors' brief suggests that, well, the injunction doesn't prevent hearing pending motions. But I would respectfully disagree with that. If you look at the language, "commencing, conducting, or continuing in any manner in any suit, action, or other proceeding against or affecting the debtor."

As 12(b)(6) hearing, I would imagine, was intended to fall under the umbrella of a proceeding. And us arguing a 12(b)(6) motion would us be conducting and maybe even

continuing the suit because we're trying to protect the merits of the suit, which as I said are at this juncture already moot.

And so it comes down to I think a very simple question, which is what do we do at this juncture. Do we just simply dismiss the lawsuit in light of this permanent injunction or stay the lawsuit in light of this permanent injunction?

The debtor makes a lot of hay out of the fact that, well, there are special rules that apply when you're trying to stay a case pending appeal. But if you look at all of their case law, it has to do with different circumstances where an appeal -- where there's a matter on appeal that could substantially affect the resolution of the case, which here we think it actually could. But in those cases, those appeals would affect the resolution of the case on the merits; whereas, here, the question goes to whether or not a permanent injunction that really has stopped us all in our tracks.

As soon as we understood this injunction and its scope, we're the ones who reached out to the debtor's counsel and asked them on a meet-and-confer whether or not they would just agree to stay the matter. And we were a little bit surprised by their reaction when they first didn't think that this applied to our case, and we didn't understand how. And then they changed their mind, said it did apply to our case but they didn't think that we should stay the case. And they

didn't suggest let's just dismiss it based upon the permanent injunction.

So it kind of comes down to the same small -- same simple issue, Your Honor. There's this permanent injunction, and I don't think there's any way for us to get around it at this juncture.

THE COURT: Mr. Pomerantz:

MR. POMERANTZ: Yes, Your Honor.

I'm going to respond to several of the arguments Mr. Sbaiti made in his motion, which apparently he's abandoned because he only is focused on the injunction. And I'm also going to tell Your Honor, what our arguments are because despite Mr. Sbaiti's efforts, he's completely misquoted them.

So in the motion and the amended motion, the Plaintiffs make several arguments why this Court should stay the matter. First, they argue they're entitled to a stay because the exculpation provision in the plan prohibits them from proceeding against the Defendants in the action. And there are several problems with that argument.

First, Mr. Sbaiti and the Plaintiffs don't even attempt to meet the Fifth Circuit's standards for a stay pending appeal because, of course, they can't. Mr. Sbaiti's trying to sidestep the grounds for a stay pending appeal by arguing it doesn't apply just is incorrect.

They would have to show that there is a likelihood of

success on the merits, they would suffer irreparable harm, the debtor wouldn't suffer irreparable harm, and there is -- public interest supports a stay. They can't do any of them.

In fact, as Your Honor is well aware, Your Honor denied the actual appellants in that suit, in that order, the confirmation order, a stay pending appeal and that was denied by the district court and also denied by the Fifth Circuit Court of Appeals.

The Plaintiffs didn't object to the plan, they are not parties to the appeal, and they never sought a stay pending appeal. So they really can't explain why they as really strangers to the appeal are entitled to a stay of the effectiveness of the plan when the actual appellants to that order were denied a stay pending appeal up through the appellate ladder.

Second, notwithstanding Mr. Sbaiti's arguments in the motion, the exculpation provision is neither as broad nor does it affect all the parties that are subject to this litigation. There are three Defendants in the complaint. The only Defendant that is covered by the exculpation provision is the debtor. The exculpation provision does not apply HCF Advisors, and it does not apply to Highland CLO Funding.

Also, while the exculpation provision does apply to the debtor, it only exculpates the debtor from claims of negligence. The complaint raises a variety of causes of action

that have nothing to do with negligence and would not be covered by the exculpation provision.

But, Your Honor, the biggest problem with their argument that the exculpation provision supports a stay is that the exculpation -- the appeal of the exculpation provision has nothing to do with this case. Why? Because the Fifth Circuit appeal concerns whether the exculpation provision is appropriate for parties other than the debtor. The debtor is the only Defendant in this case that obtains the benefit of the exculpation.

And there is no dispute, there was no dispute at confirmation, there's no dispute in the case law, there's no dispute in Pacific Lumber, there's no dispute in the appeal that a plan can exculpate the debtor. So the Fifth Circuit appeal doesn't implicate the exculpation provision and cannot support a basis for a stay.

The next argument Mr. Sbaiti makes is the injunction provision, and the injunction provision is on appeal to the Fifth Circuit. But the aspect of the appeal of the injunction is not the provision that Mr. Sbaiti points to.

And, again, as with the exculpation provision, the same arguments about failure to obtain a stay, failure to be party to the appeals, and failure to object to the plan apply, as well. But as is the case with the exculpation provision, the resolution of the appeal of the injunction provision will

not affect this case in any way.

They point to the portion of the injunction that prohibits enjoined parties from directly or indirectly continuing, commencing, or conducting in any manner any suit or action proceeding against the debtor. They argue that they cannot proceed without violating the injunction because the injunction was intended to put all litigation against the debtor to an end.

But, of course, Your Honor, that is not true. That is not what the injunction is. The issue on appeal before the Fifth Circuit as it relates to the injunction is whether the injunction impermissibly enjoins parties from enforcing their rights with respect to post-effective date commercial relationships with the reorganized debtor. And, of course, we argue that it's appropriate, but it has nothing to do with the provision Mr. Sbaiti identified.

The appeal does not impact in any way whether a plan can enjoin prosecution of claims that arose prior to the effective date. And, of course, such a plan provision is completely appropriate and is customary. The plan provided the debtor as the plan provides all debtors with a fresh start and enjoins litigation against the debtor.

But importantly, Your Honor, that does not mean as Plaintiffs argue that any liability for pre-effective date conduct just goes away and that creditors are left without a

remedy to pursue claims against the debtor for pre-effective date conduct.

Rather, if they have a pre-petition claim in lieu of their litigation that's pending, they file a pre-petition claim against the estate and that matter is resolved in the claims objection procedure. Or, as in the case here, when they make an allegation that there is a post-petition claim, what do they do? They file a request for payment of an administrative claim, and this Court addresses the validity of the administration claim. The lawsuit pending in another jurisdiction stops, but the claim has to be resolved in the bankruptcy court.

The only conduct that the injunction really prohibits is them from proceeding with actions in other courts. It does not deny them a remedy. Accordingly, their argument that they cannot proceed with claims against the debtor because of the injunction provision just lacks any merit and can't form the basis for a stay.

Plaintiffs' next argument in their briefing is that if the Court refuses to stay the complaint, they will file a motion to withdraw the reference of this matter to the district court. Your Honor, this is the biggest head-scratcher of them all given how this complaint ended up before Your Honor. This exact issue and Plaintiffs' arguments as to why the reference should be withdrawn have already been fully briefed and decided

by the district court.

As Your Honor may recall, the Plaintiff filed this action in the district court, conveniently failing to include the bankruptcy case as a related case or mentioning that the bankruptcy courts have related jurisdiction in the filings. Your Honor may have had occasion to review the underlying complaint when the debtor brought a motion for contempt against counsel for Plaintiffs for pursuing a claim against Mr. Seery in violation of Your Honor's January 9th, 2020 and July 16th, 2020 orders.

Your Honor issued an order finding counsel and various parties in contempt which order is, of course, subject to appeal. At the time we were litigating the contempt motion, we filed two motions in district court. The first was a motion to enforce the reference and have the district court send that complaint to Your Honor. And that motion to enforce the reference is now on Your Honor's docket at Number 22 and 23.

The second was the motion to dismiss which is before Your Honor today. Plaintiffs oppose the motion to enforce the reference arguing that mandatory withdrawal was required because the matter involved consideration of non-bankruptcy federal law, specifically federal securities laws and the Investment Advisors' Act.

Plaintiffs further argue to the district court why would you refer the case to the bankruptcy court if it's only

going to end up back in the district court upon mandatory withdrawal of the reference. They argue to the district court that would be a complete waste of time.

We filed our reply at Docket Number 42 explaining to the district court why mandatory withdrawal of the reference did not apply and why this case should be referred to Your Honor. And what did the district court subsequently do? It entered an order referring this action to Your Honor which is why we are here today.

Plaintiffs now flout the district court's order of reference by telling the Court that if the Court does not stay the matter, they will file a motion to withdraw the reference before Your Honor, and they attach virtually identical pleading that they filed in opposition to our motion to enforce the reference.

Plaintiffs did not disclose in their amended motion that there was a fully-briefed motion to enforce the reference before the district court. Plaintiffs' argument is disingenuous and designed to mislead the Court.

The district court has only agreed that mandatary withdrawal of the reference does not apply and this case belongs in Your Honor. And while we cannot stop the Plaintiffs from filing any motion before this Court, we want to put them on notice that if they do file a motion for withdrawal of the reference in light of the facts as I just stated them, we will

seek sanctions.

In any event, Your Honor, the fact that they may file a motion for withdrawal of the reference at some point in the future is not grounds to stay the matter.

Lastly, Your Honor, Plaintiffs argued in the opening that Highland's position today in opposing the motion to stay is inconsistent with positions Highland has taken in two other lawsuits commenced by the Sbaiti firm. Like all of their other arguments, they misrepresent the facts and are frivolous.

The Sbaiti firm filed a complaint on behalf of the DAF in the district court arguing that Highland mismanaged (audio drop). That complaint followed in the heels of an almost identical complaint filed by Dugaboy asserting the same claims.

And Your Honor may recall questioning Mr. Sbaiti at a hearing in June how Dugaboy could pursue such a claim in the district court if Dugaboy had a pending proof of administrative claim on file in the bankruptcy case. Well, soon after that hearing, Your Honor, the Dugaboy complaint was dismissed, and a few days later the DAF complaint was filed. That complaint has never been served on Highland.

The second lawsuit is also a lawsuit filed by the Sbaiti firm on behalf of an entity called PCMG in the district court. And PCMG previously held less than five one-hundredths of a percent interest in a certain fund managed by highland.

The lawsuit alleges that Highland acted improperly to sell certain assets of the fund, thereby damaging PCMG. That complaint has also never been served on Highland.

The Plaintiffs sought a stay of those matters before Highland could file a response, and the court -- the district court's entered stays in those matters. And Highland has filed motions for reconsideration and the motions to dismiss because they violate the injunction.

But, importantly, Your Honor, if you read the motions, Highland does not argue that Plaintiffs do not have a remedy for the alleged wrongs they say they suffer. Rather, Highland's argument is that any claims alleged in those lawsuits, just like any claims alleged in the lawsuit before Your Honor today, must proceed in bankruptcy court as part of the claims objection process. That's where they will have their day in court. The lawsuits don't go away. The injunction prevents them from continuing on in district court.

Accordingly, Highland is being totally consistent in all matters, and the litigations may not proceed there but must proceed before Your Honor. And, of course, none of these three matters are implicated by the Fifth Circuit appeal.

Your Honor, the amended motion was procedurally improper and is substantively without merit. And for all these reasons, we request that the Court deny the stay motion and proceed with the hearing on the motion to dismiss.

Thank you, Your Honor.

THE COURT: All right.

Mr. Sbaiti, you get the last word.

MR. SBAITI: Thank you, Your Honor.

Your Honor, the administrative claim process that was described as being the way that these claims were supposed to proceed, by the language of the order that we read, does not allow for these claims. Those claims are limited to a specific category of claims that don't include the claims that are alleged in this lawsuit.

And in any event, this lawsuit wasn't filed as an administrative claim. So if that's the case and it needs to be refiled or reasserted as an administrative claim, then I think that's a subject for another day. All I know is that we have this injunction right now that either should stay this case pending the appeal, which I'll address the issue on appeal in a moment, or it should be dismissed, perhaps without prejudice so that it can be refiled properly as an administrative claim if that's what's supposed to happen, because I guess this converts the matter.

The appeal, the subject of the appeal as to the injunction, Your Honor, the appeal actually encompasses many of the issues that we're talking about in this case. Now Mr. Pomerantz tries to narrow the scope of what's up on appeal, and that may indeed be the argument that they're going to present

to the Fifth Circuit or that they've presented to the Fifth Circuit.

But the actual issue up on appeal is the enforceability and validity of the order for a variety of reasons which includes the provision that we're talking about and the enforceability of the provision that we're talking about because it gets rid of particular claims. And I guess the argument back is, no, it doesn't because there's now an alternative means of going there.

Mr. Pomerantz says that we shouldn't have proffered a motion to enforce the reference. That proffer, however, was because Judge Boyle's reference to this Court didn't deal with our motion to -- our cross-motion to withdraw the reference. All it dealt with was their motion to enforce the reference as a -- to enforce the standing order in the district court. And that's all she ordered was she cited the standing order and the statutes, I think it's 157(a), and that's really all it did.

So it left open the question of whether she wanted Your Honor to deal with the withdrawal of the reference specifically as to the 12(b)(6) issue in the first instance. It didn't resolve the question. It doesn't purport to resolve that question. And it's not unheard of for the district court then to send the matter to the bankruptcy court and then to piecemeal which proceedings the withdrawal of the reference is applicable to and then all the other proceedings would stay

with Your Honor or with the bankruptcy court.

So we weren't flouting the district court's order, and we certainly weren't flouting any of the previous orders. And the threat of a sanction for simply exercising our rights in due course is not well taken.

Now Mr. Pomerantz says, well, the DAF and CLO Holdco are not parties to the appeal. I don't think that's relevant because if the provision is struck by the Fifth Circuit, it's not only struck for the appellants, it's struck as to all. It's either valid or it's invalid. And even if it's declared to be invalid only as to the appellants, it's not suddenly valid as to everyone else who didn't appeal. That's not generally how these appeals have worked.

If the Court doesn't stay this matter, Your Honor, and doesn't dismiss it, we still maintain, Your Honor, that as it stands today, the question on the merits have been mooted and we cannot proceed. I think what Mr. Pomerantz is hoping for or the debtor is hoping for is a provision where our hands are potentially tied to argue the motion.

And if the Court tells us they're not, then we'll certainly argue the 12(b)(6). But what I don't want to do is argue a 12(b)(6) motion that on its face appears to violate the permanent injunction and then be held in contempt for violating that injunction.

And so that's why we've asked for the Court to either

stay the matter under its inherent jurisdiction or to -- if you're going to -- if it's not going to be stayed, then we believe it has to be dismissed according to the permanent injunction as it stands right now.

THE COURT: All right.

The motion to stay is denied. The amended motion to stay is likewise denied. This is an odd argument. I guess one might say the traditional four-factor test for a stay of a proceeding has really not been the subject of the argument here for a stay.

So suffice it to say the four-prong test for a stay, you know, hasn't been met here. There hasn't been a showing of substantial likelihood of success on the merits or irreparable injury if the stay's not granted or a stay will not substantially harm others or the stay would serve a public interest.

But going on to the arguments that were focused on by movant, I just don't think that you have shown that, you know, either the exculpation clause or the injunction provisions of the plan somehow tie your hands in arguing the 12(b)(6) motion, defending against the 12(b)(6) motion today or I just think that your arguments reflect, frankly, a misunderstanding of how the injunction language and exculpation language applies here.

So the motion for stay is denied, and I will ask Mr. Pomerantz to submit an order reflecting the Court's ruling.

So it looks like we have another procedural matter, Mr. Sbaiti. You filed a motion to strike reply appendix of the Plaintiffs quite a while back. So did you want to present that?

MR. SBAITI: Yes, Your Honor. I think it's a very simple procedural issue.

Generally, a party that files a 12(b)(6) is limited to the four corners of the complaint. And if there's a contract incorporated or a document incorporated as an intrinsic part of the complaint, you know, that's usually considered under the 12(b)(6) motion.

What the Defendants did, what the debtor here did is they filed a bunch of evidence in their 12(b)(6), essentially attempting to argue it as a summary judgment. We raised that in our response. So as part of our response, we objected to all the evidence. But then on the reply, they filed a bunch more evidence both without leave and improperly, basically sandbagged us.

And so we raised two points for striking that evidence. One was akin to the first argument, which is it's not an evidentiary hearing. It's not an evidentiary process in the first instance. A 12(b)(6) motion has to assume that the facts pled are true, and then the question is whether they state a claim.

And, secondly, adding them to the reply is especially

egregious because the reply is the last word. And we didn't have an opportunity to respond, and we also don't think it's relevant nor should we have to respond to a whole bunch of extra evidence that was attached.

That's essentially the basis of our motion, Your Honor.

MR. POMERANTZ: Your Honor, the simple answer to the issue is we filed the reply of the appendix in connection with the motion to enforce the reference. We didn't file it in connection with the motion to dismiss. The motion to enforce the reference is moot. So what Mr. Sbaiti, his whole argument doesn't make any sense.

As a substantive matter, just there wasn't any evidence. It was pointing to court pleadings, orders, and stuff. So it's irrelevant. I don't know why it's still on the docket. It shouldn't be on the docket since it related to the motion to enforce the reference.

THE COURT: All right. Mr. Sbaiti, did you just simply --

MR. SBAITI: Your Honor, much of that evidence was --

THE COURT: -- misunderstand or what?

MR. SBAITI: I think we might have because it was filed as a separate item, and it may have been miscalendared or misapplied on our system. But the way it was presented to us when we got it was it appeared to be evidence in support of,

well, I guess both, but certainly evidence that was averted to in the reply.

But if they're saying that the Court's not going to consider it, then that moots the motion and I think we can move on.

MR. POMERANTZ: Yes, Your Honor. I had nothing to do with his motion. I guess there was another mistake on their end. I guess that stuff happens occasionally.

THE COURT: Okay. All right. So I'll deny it as based on a mistake that's been acknowledged here. And so with that, let's have an order cleaning that up, as well, Mr. Pomerantz, please.

With that, we'll move on to the Defendants' motion to dismiss complaint. I think, Mr. Pomerantz, you said Mr. Morris will be making this argument?

MR. POMERANTZ: That is correct, Your Honor.

THE COURT: All right.

Mr. Morris, I'll hear your argument.

MR. MORRIS: Good morning, Your Honor. John Morris for Pachulski Stang Ziehl & Jones for the reorganized debtor. Can you hear me okay?

THE COURT: I can. Thank you.

MR. MORRIS: Okay.

Your Honor, this is a bit like Groundhog's Day. I believe that we're going to spend the next half hour or an hour

discussing the very issues that were before the Court earlier this year on the HarbourVest 9019 motion.

As the Court will recall from the June 8 hearing, there is a complaint that's been filed ostensibly by the DAF and CLO Holdco. As Your Honor will recall, the testimony established that Mark Patrick had just been installed as the trustee, had no knowledge of the prior events, and Mr. Dondero and Mr. Sbaiti spent quite some time together formulating this particular complaint that is nothing less than a collateral attack on the Court's prior order.

I'd like to, if I can, just walk through a PowerPoint presentation to try to make the debtor's position quite clear, if I may.

THE COURT: You may.

MR. MORRIS: And I would ask my assistant, Ms. Canty (phonetic), to put up the first slide.

Your Honor, you'll recall that last December, the debtor filed its motion under Rule 9019 for court approval of a settlement. The debtor was completely and utterly transparent in what the terms of the settlement were.

Very briefly, as set forth in Appendix 2 or Exhibit 2 which was the motion itself, in Paragraph 32, Your Honor, the debtor set forth the terms of the transaction for which it was seeking approval. Those terms included in the very first bullet point a statement that HarbourVest shall transfer its

entire interest in CLOF to an entity to be designated by the debtor.

And that's an important point that we'll talk about in a number of different contexts, Your Honor. The debtor made it very clear at the very first moment of this matter that it was not going to acquire the asset but the asset was going to be transferred to an entity to be designated by the debtor. The debtor's motion filed last December clearly stated the value of the interest that it would be acquiring in return. That was also set forth in Paragraph 32 in a footnote.

It didn't say that it was the fair market value. It said the method of valuation was the net asset value and gave a valuation date of December 1st so that all parties in interest who received the motion understood the economics of the deal. And the deal that the debtor was asking the Court to approve was one whereby HarbourVest would receive certain claims and in exchange for those claims, they were going to transfer their interest in CLO -- HCLOF.

The debtor also filed on the docket for all to see a copy of the settlement agreement. The settlement agreement sets forth the terms of the deal, including again the statement that HarbourVest "will transfer all of its rights, title, and interest in HCLOF." It actually says to an affiliate or an entity to be designated by the debtor. And the transfer agreement itself was also put on the docket.

So that's where things stood just before Christmas. I know that there's some due process and other type arguments that are in the Plaintiffs' opposition to the motion. But, of course, the undisputed facts are that the debtor timely filed the motion. The time period was consistent with all applicable rules. Nobody ever asked the debtor for an extension of time. Nobody ever filed a motion for an extension of time. And so those due process arguments I think carry no weight at all.

So the debtor filed the motion. And if we can go to the next slide, we see what the responses were, and there were several. All of the responses, the only responses were objections to the motion filed by Mr. Dondero and his certain of his affiliated entities.

Mr. Dondero's objection can be summarized as follows. He made the following observations and asserted the following objections to the proposed settlement. The first thing he said is that the settlement far exceeds the bounds of reasonableness. Now, of course, one cannot make a determination of reasonableness without having an understanding of value. The debtor was giving something and it was getting something.

And so Mr. Dondero understood that the issue of value was front and center. If there was any mistake about it, he also noted that he understood that as part of the settlement and, again, I've written this incorrectly, HarbourVest will

transfer its entire interest in HCLOF to the debtor. That is not what Mr. Dondero understood. In fact, Mr. Dondero understood that it would transfer its entire interest in HCLOF "to an entity to be designated by the debtor," again, making it clear that he knew exactly what the debtor was doing here. And that can be found at Appendix 4 in Footnote 3 on Page 1 if you want the exact quote from Mr. Dondero's pleading.

In the same footnote, he also specifically acknowledges that he understood the valuation. He understood the method valuation. He understood the valuation date of December 1st. And he urged the Court in his pleading to scrutinize the settlement to make clear that the available value of the investment should be realized by the debtor's estate.

And this is such a critical point, Your Honor. His concern was that by placing the value in an entity other than the debtor itself, that the Court wouldn't have jurisdiction over that asset. That was his concern. So not only did he understand that the asset was going to be transferred to an affiliate, he wanted to make sure that this Court had jurisdiction over the asset.

And, of course, Mr. Seery in his testimony and otherwise, we provided the Court with all the comfort it needed to know that even though it was being assigned to a special-purpose vehicle wholly-owned by the debtor, it would

nevertheless be subject to the Court's jurisdiction.

Mr. Dondero's trusts also filed an objection if we can go to the next slide.

Dugaboy and Get Good represented by Douglas Draper made the following observations and asserted the following objections to the HarbourVest Settlement. They, too, made clear that they understood that the asset was going to be transferred to an entity designated by the debtor. They, too, acknowledge that they understood that the debtor was valuing the asset at approximately $22 million as of December 1st. And their objection was that the Court couldn't evaluate the settlement without knowing how the asset was valued, without knowing whether the debtor could acquire the asset, very critical point.

These are the points that are made in the complaint. These are the exact same points that are made in the complaint. And also the Court couldn't evaluate the settlement unless they understood that the value would be inure to the benefit of the debtor's estate, again, mimicking Mr. Dondero's concern that by placing the asset in an affiliate of the debtor, that it might not be subject to the Court's jurisdiction.

Finally, and most importantly, if we can go to the next slide. The Plaintiff, CLO Holdco, filed an objection to the 9019 motion. And this is just so critical. And this is the Groundhog Day aspect that I specifically speak of. CLO

Holdco's objection was based solely on its assertion that it had a superior right to the opportunity to acquire the asset that was being transferred by HarbourVest. It only made one argument in support of its contention that it had a superior right, but that argument was specifically premised on the membership agreement, Section 6.1 and 6.2 of the membership agreement.

CLO Holdco, the Plaintiff in the underlying action, argued to this Court that HarbourVest had no authority to transfer the asset without complying with the right of first refusal that would give CLO Holdco the opportunity to take the asset for itself. That's what this Court was told. CLO Holdco didn't make this argument fleetingly. They provided an extraordinarily detailed analysis of Sections 6.1 and 6.2 of the membership agreement and concluded "that HarbourVest must effectuate the right of first refusal before it can transfer its interest in HCLOF. That was the objection. Objections have consequences, as Your Honor knows.

If we can go to the next slide.

By filing an objection, CLO Holdco and the trusts and Mr. Dondero became participants in the litigation. Notwithstanding the Plaintiffs' arguments to the contrary, when they file the objections, they participate in what's called a contested matter. And in a contested matter, they had every right to take all discovery on any issue that was related to

the 9019 motion, including the transfer, the disposition of the asset to an affiliate of the debtor, the valuation of the asset that's being received, the merits of the settlement itself, the causes of action, whether, you know, what communications that were, the negotiations, what did Mr. Seery and Mr. Pugatch discuss? Right?

They could have taken any discovery they wanted. And they did avail themselves of discovery, in fact. They did -- I don't know why they did what they did, but they chose to take one deposition, and that was Mr. Pugatch, okay.

His deposition transcript, I think is at Exhibit 7, or Appendix Number 7, and it was a long deposition. It really was. And they asked Mr. Pugatch at the deposition if he knew what the value of the asset that was being transferred was. And he said $22.5 million. So it wasn't just Mr. Seery or the debtor who was subscribing to this valuation. The party on the other side of an arm's length negotiation was subscribing to the exact same valuation.

The Plaintiffs could have taken whatever discovery they wanted. This is a full and fair opportunity to participate in the litigation. We proceeded to trial. Before we got there, actually, the debtor filed its response to CLO Holdco's objection and proffered its own very detailed and apparently very persuasive analysis that CLO Holdco's objection was without merit, that CLO Holdco had no right of first

refusal under the facts and circumstances as they existed, and with Grant Scott, Mr. Dondero's childhood friend at the helm, we got to Court for the contested hearing on the debtor's 9019 motion, and CLO Holdco withdrew their objection.

And I've put up on the screen just an excerpt of the transcript because, you know, when we talk about whether or *res judicata* should apply, because was there a hearing on the merits? Was there a decision on the merits? Just look at the words of CLO Holdco's lawyer. "CLO Holdco has had an opportunity to review the reply briefing and after doing so has gone back and scrubbed the HCLOF corporate documents based on our analysis of Guernsey law."

And some of the arguments of counsel in those pleadings and our review of the appropriate documents, counsel obtained the authority from Mr. Scott to withdraw the CLO Holdco objection based on the interpretation of the member agreement. We were grateful for that and the Court specifically said in response, "That eliminates one of the major arguments that we had anticipated this morning."

Apparently, the Plaintiffs believe that those events have no meaning and that this Court's reliance on CLO Holdco's substantive withdrawal of its objection has no meaning. I think they're wrong, and we'll get to that in a moment.

We proceeded with the hearing. Mr. Seery and Mr. Pugatch testified at length. If you look at Footnote 3,

you'll see Mr. Seery testified for almost 70 pages of testimony. Mr. Pugatch testified for almost 45 pages of testimony. His testimony was exhaustive. And, again, any of the objecting parties had the right to ask whatever questions they want.

But I do want to just note a few things that aren't up on the screen right now. If you go to Appendix 9, Your Honor, which is the transcript of the hearing, at Page 13, you will see that the very first thing I discussed in my opening statement was the economics and how with a valuation of $22.5 million this deal made sense for the debtor.

You will see from Pages 30 to 42 there is extensive testimony from Mr. Seery about the amount and the value of the asset. But the most important part of Mr. Seery's testimony is that he explains how it came to be that HarbourVest agreed to transfer its interest in HCLOF to an affiliate of the debtor. And that came about, not because Mr. Seery or the debtor was initially at all interested in doing this. The whole idea originated with HarbourVest.

They wanted to extract themselves from the Highland platform. They wanted to give this piece up. So there's no conspiracy going on here. The unrebutted testimony that all of the objecting parties had an opportunity to challenge was that the whole idea originated with Mr. Pugatch and with HarbourVest. I think that's an important point to take into

account.

And finally, again, from the hearing, if you look at at Appendix 9, you'd also find that Mr. Pugatch, again, testified, as he had in his deposition, as to the value of the interest being transferred. So we completed the testimony. We rested our case having had a full and fair opportunity to contest the motion. The objecting parties rested as well. And we got to the point where we had to prepare the notice, and we were discussing that at the hearing, if we can go to the next slide.

And it's very important, because again, this was all done transparently, and it was all done on the record. And after the close of evidence, I addressed the order that was going to be prepared. I specifically said that I wanted to make clear that we were going to include a provision, "that specifically authorizes the debtor to engage in, to receive HarbourVest the asset, you know, the HCLOF interest," right. I wanted everybody to know that was what was going to happen, and then I said, "The objection has been withdrawn." I think the evidence is what it is and we want to make sure that nobody thinks they're going to go to a different court somehow to challenge the transfer. But yet, that is exactly what the complaint seeks to do.

Having put everybody on notice as to where we were going, as to what the evidence showed, the debtor drafted and

the Court adopted an order, and the order says, among other things, that HarbourVest was authorized to transfer its interest to the debtor. Actually, it says, "to a wholly owned and controlled subsidiary of the debtor," pursuant to the transfer agreement, "without the need to obtain the consent of any party or to offer such interest first to any other investor in HCLOF." So the Court heard the 9019 motion pursuant to a Bankruptcy Rule and entered and order that was unambiguous and that the Plaintiffs did not appeal from.

We can go to the next slide.

At a very high level, Your Honor, it is just crystal clear that the complaint is just inextricably intertwined with the 9019 proceedings and the order itself. I think Mr. Sbaiti would agree with me that but for the order that approved the transfer of the asset and the testimony about the value of that asset, they have no claims.

Every single claim is predicated on what happened in the 9019 hearing. Every single claim is predicated on the Court's order approving the transfer of the asset and the testimony and evidence that was adduced in relation to that asset.

There were really only two issues that the Court -- I mean, if you want to think about it at its most simplistic level, the Court was being asked to assess, is it fair, is it reasonable, is it legally permissible for the debtor to give

something. In this case, allowed claims and releases, and to get something in return. In this case, HarbourVest's interest in HCLOF and releases in return. And that is really the gravamen of the complaint.

The complaint is based whether it's breach of fiduciary duty or RICO or breach of contract or tortious interference, whatever the claim is, none of them exist if the debtor doesn't get this. They just don't exist. And that is why the complaint and the proceeding are inextricably intertwined. And if you just take a look at just one paragraph of the pleading, it says at the core of this lawsuit is the fact that HCM, that's the then debtor, purchased the HarbourVest interests in HCLOF for $22.5 million knowing that they were worth far more than that. There's not a cause of action that exists in the complaint that isn't dependent on Paragraph 36.

So if we can go to the next slide with that background, I'd like to argue why under 12(b), the complaint should be dismissed because the claim should be barred under the doctrine of *res judicata*. Luckily, Your Honor, there is at least one area of agreement between the parties here, and that is the purpose of the doctrine and the elements that have to be satisfied in order to meet the burden of proof necessary to have the claims barred. And in Footnote 1, you can -- I've tried to just be helpful to the Court to show that we may not

cite to the exact same cases, but the parties agree that the doctrine is intended to foreclose the re-litigation of claims that were or could have been raised in a prior action and that there's four elements that have to be satisfied for the doctrine to apply.

The parties have to be either identical or at least in privity, the judgment in the prior action had to have been rendered by a court of competent jurisdiction. Number three, the prior action had to have been concluded by a judgment on the merits. And the last one is that the same claim or cause of action was involved in both suits. So I just want to spend a few minutes now, Your Honor, going through those four elements to show the Court how easily the reorganized debtor meets this standard.

If we can go to the next slide, I can take care of the first two elements very quickly.

The first element, the debtor asserted that the Plaintiffs were parties or in privity with parties to the prior proceeding. That's at Paragraph 17 of the motion to dismiss. The debtor relies on the deposition testimony of Grant Scott, who was then the trustee of the DAF.

CLO Holdco is a wholly-owned subsidiary of the DAF, or wholly controlled, in any event, and Mr. Scott's testimony was that he was the only director and there were no employees of either entity. So we, in our motion, put forth evidence to

establish the first element, and I don't believe, maybe I've missed it. I don't believe that the Plaintiffs have contested that element. If they have, I think Mr. Scott's testimony will carry the day, in any event.

The second element as to whether or not a court of competent jurisdiction is the entity or the court that rendered the ruling. Of course, that's been met, too. The Plaintiffs, in their opposition to the motion to dismiss, suggested that the bankruptcy court would have lacked jurisdiction if their cross motion to withdraw the reference was granted. They said if the district court decides that mandatory withdrawal applies, then it cannot find that the bankruptcy courts already entered final judgment was rendered on Plaintiffs' causes of action and had jurisdiction to do so. I think that's just a clear misstatement of the law.

But in any event, Your Honor, at this point, I believe it's irrelevant because the district court, in fact, sent the case back to Your Honor and back to this Court. And so, at the end of the day, Plaintiffs' argument doesn't hold water because of the district court's ruling, which can be found -- the order of reference can be found at Docket Number 64. And so I think that easily takes care of the second prong.

The third prong is whether -- if we can go to the next slide -- the prior proceeding resulted in a judgment on

the merits. And this is really the critical point, Your Honor. As the Court knows, the whole doctrine of *res judicata* is designed to prevent, as the parties agree, the re-litigation of claims. Stated another way, it's to bring finale. It's to make sure that the Court doesn't hear the same claims and the same issues that either were brought or that could have been brought in a prior proceeding. And so, we believe that we easily meet the standards set forth in the third prong. The 9019 order necessarily determined that the *quid pro quo* that I described earlier was fair, reasonable, and legally permissible.

Notwithstanding their assertions to the contrary, the Plaintiffs are most definitely seeking to unwind at least one half of the Court's order by belatedly claiming that they are entitled to the benefit of the bargain while leaving Highland burdened, frankly, with the claims that HarbourVest got as part of the deal. I will tell you, Your Honor, and this is argument, the debtor would never have asked for, and I don't believe that the Court would ever have granted, the 9019 motion if they thought that there was a risk in the future that Highland wouldn't get the benefit of the bargain and it was incumbent upon CLO Holdco and the DAF, and frankly, any party in interest, to stand up and be counted and tell the Court and the debtor, why the debtor was not entitled to do this deal and CLO Holdco did that. They actually did.

They stood up and they filed an objection and they said we have a superior right to this asset in the form of a right of first refusal. They wound up folding in the face of persuasive argument, and I respect the lawyer who did that. I just do. But that was the time to speak up, and that's why it is on the merits because that is exactly what *res judicata* is intended to do. It's intended to have everybody put your cards on the table. You don't put one card on the table and say, I'm going to challenge this under 6.2 of the members agreement, but I'm not going to tell you that I also think you owe me a fiduciary duty under the Advisors Act or as the control party or under any other theory that they had. They can't do that. That's exactly what the problem is here.

If we can go to the next slide. Is it a judgment on the merits? The debtor and the Court relied on CLO Holdco's representation that it was withdrawing its argument, its claim, its contention, its assertion that it had a superior right to obtain the HarbourVest interest in HCLOF. Again, they did so not whimsically, not because Mr. Kane was going to be out of town and he couldn't make the hearing. He did it after, and I don't think this matters frankly, but I think it's worth noting that he did it after an extremely careful analysis. I would tell you, Your Honor, that -- well, I would argue, Your Honor, that even if Mr. Kane at CLO Holdco had never filed an objection, if they'd never filed -- if they'd gotten notice

that this was happening and they sat silently, that would have been enough for *res judicata* because the issue before the Court was whether it was legally permissible for the debtor to acquire this asset.

And if they had an obligation, if they owed a duty to another party, it wouldn't have been legally permissible. And if somebody believed that it wasn't legally permissible because a duty was owed to them, they had an obligation to speak up. And so I think it's very important, particularly for the collateral estoppel argument that I'll make in a moment, that CLO Holdco did in fact file an objection. It was based on the breach of contract claim that's in their complaint. It's the exact same claim. And they withdrew it. I think it's very, very important. I think it highlights why *res judicata* applies. I think it is the linchpin of the collateral estoppel argument.

But at the end of the day, I think if they say nothing, they should be estopped or precluded under *res judicata* from now asserting -- it would be like -- I was thinking about this earlier, Your Honor. If you'll remember earlier this year, Mr. Dondero and his entities have kind of a habit of withdrawing objections at the last minute. We had a couple of sale hearings earlier this year. And the issue was valuation, you know, and the process, and could the debtor meet its burden of proving that the sale outside of the ordinary

course of business was in the debtor's best interest. And they sold that restaurant. And Mr. Dondero objected. And at the last second, they withdrew the objection. Did they sue tomorrow? Does Your Honor really think that they could bring a lawsuit tomorrow and say they just found a document or theory on which the debtor had an obligation to give them a right of first refusal, even though we've already closed on the transaction, even though they were given notice of the transaction, even though they filed an objection to the transaction, even though they withdrew the objection? Would the Court tolerate for one second a new pleading tomorrow from Mr. Dondero that the debtor actually had a fiduciary duty to give him a right of first refusal to buy that asset under whatever theory, just because he pleads it and the Court has to accept as true the allegations in the complaint? I think not. And I think it's worth thinking about that to highlight just how -- just how wrong this is.

Continuing on. You know, the Plaintiffs in opposition say it can't be a trial on the merits because we weren't parties. Of course they were parties. Again, they filed an objection. They were the parties to the contested matter, full stop. They rely on a case called Applewood and they say, this is the very first point they make in their brief. Applewood, if it wasn't *res judicata* in Applewood, how could it possibly be *res judicata* here? But the facts are just

so inapposite, right?

In Applewood, you had a garden variety plan and release where the debtor and the officers and directors got a discharge. No objection to it. And a secured lender later on sought to sue guarantors who happened to be officers and directors. And the court, not surprisingly, said that the confirmation order wouldn't prevent the secured lender from going after the officers and directors, not in their capacities, as such, but in their capacity as guarantors, which were never part of the confirmation order. That just doesn't apply here because here, we have the debtor making a motion before the Court in which it sought permission and authority to acquire a particular asset. Anybody who had a claim to that asset should have stepped forward and put their cards on the table.

And again, CLO Holdco put their cards on the table and they lost, and they folded. To use the poker analogy, they folded. And to hear them come into Court today and say we're going to sue you because I reshuffled the deck, it's not right and Applewood has no relevance.

Finally, Your Honor, you know, it's not on the merits, they say, because you know, Mr. Seery and the debtor hid the true value of the asset, and had we only known the true value of the asset, we would have made all of these other claims. The fact of the matter is, you either have a fiduciary

duty or you don't. And if you had a fiduciary duty, they should have spoken up and they did only under 6.2, but they did.

But here's the important part, Your Honor. Take the allegations as true. You have to take all of the allegations as true, not just some of them. And if you look at Paragraph 127 of the complaint, and I would ask Ms. Canty to go to Appendix 11 and let's just put Paragraph 127 up on the board.

Here's the irony of the whole thing, right. The whole complaint is based on the fact that somehow Mr. Seery was engaged in insider trading. They accused him of insider trading, and they say he didn't disclose the full value of the asset. Just read Paragraph 127. James Dondero, who was on the board of MGM, is the tippee. You've got an insider trading case -- I mean, I don't represent MGM. I'm not with the SEC. I don't know why Mr. Dondero thought he should be telling Mr. Seery in December, 2020. It's not clear if it was before or after the 9019 motion was filed. But Mr. Dondero is the very source of information -- you can't make this up. He's the very source of the information that he now complains Mr. Seery didn't disclose.

Of course, Mr. Dondero, the trust, CLO Holdco could have asked Mr. Seery at any time, how did you come up with your valuation? Mr. Dondero, knowing that he had supplied to

Mr. Seery, according to Paragraph 27, please take it as true for purposes of this motion only. He's the source of the inside information. And now he has the audacity to come to this Court, notwithstanding the Court's approval, all of the time and money and effort spent in the 9019 process, and say, Mr. Seery was wrong because he didn't tell CLO Holdco and the DAF about the information that Mr. Dondero gave to Mr. Seery. It's not right.

It was a judgment on the merits. And if Mr. Dondero or the DAF or CLO Holdco or the trust wanted to challenge the valuation, they had every opportunity to do so. And based on Paragraph 127, if the Court accepts it as true, shame on them. Shame on them for not pursuing this issue before. The guy gave Mr. Seery, according to this allegation, and I'm just going to leave it there, inside information. And he sits there in silence, right? It says, look at the last sentence: "The news of the MGM purchase should have caused Seery to revalue HCLOF's investment." Seriously?

The third element is (indiscernible). The fourth element, if we can go to the next slide.

Are they the same claims? Did the claims arise from the same set of operative facts? I've addressed this pretty clearly already, so I don't want to belabor the point. But obviously, both the 9019 motion and the complaint arise solely from the debtor's settlement with HarbourVest. The debtor's

acquisition of HarbourVest's interest in HCLOF and the debtor's valuation of that interest. Without those three facts, there is no complaint. It's just not credible to argue that the fourth element is not met.

The case law is clear. It's quoted in the Plaintiffs' opposition. It's not just the test of whether the claims are the same. It's whether the claim is the same as that which was brought or could have been brought.

In their opposition, the Plaintiffs contend that the claims "did not write them until after the settlement was consummated," and that the first time the plaintiffs heard about the valuation of HarbourVest's interests was at the January 14, 2021, hearing. I think I quoted that. If you look, I don't know if it's Page 10 or Paragraph 10; the way I wrote it, it's probably Page 10. I think that's a quote right out of there. But of course, as we saw the debtor disclosed the valuation in its very initial motion, CLO Holdco's counsel elicited valuation testimony directly from Mr. Pugatch, so that was before the hearing.

And of course, Mr. Dondero and the trusts both cited in their objections the valuation. The notion that this was not right, just -- it's contradicted by their own conduct, their objections, their questions in deposition, the information that was contained in the motion that they objected to.

I do want to go off-script for just a minute, if we could just take that down because I know that this is probably something that Mr. Sbaiti may argue. And that is, well, gee, but you have to take the allegation as true that Mr. Seery wasn't honest, that Mr. Seery lied to the court. I don't understand why there's not a fraud cause of action in there, but there's not. But that's their theory.

And gee, how does he get to skate away Scott free if he's allowed to do that with impunity, right? I will tell you, Your Honor, of course you've seen Mr. Seery many times. You've made your own assessments of his credibility. I'm not here to argue the merits, but I will just say that the Defendants, if ever forced to, will contest the allegation.

But here's the thing, and here's the important point about, you know, whether or not he could lie with impunity and say, I suspect that's where Mr. Sbaiti is going to want to go.

Mr. Seery said what he said. And he had a reason to speak, and he spoke, and he said what he said and he told everybody who would listen exactly what he was doing and how he was doing it. For whatever reason, the objectors put the valuation front and center. It's right in their objections. They noted the objections. But for whatever reason, they did nothing.

Whether they were negligent or whether they were lying in wait is kind of irrelevant. They had a full and fair

opportunity to contest this issue. And if they had done so, and the evidence proved what they're now alleging, they can't tell you what would have happened. So, you know, HarbourVest may have taken a different position. The Court may have done something.

We're never going to know now because Mr. Seery and the debtor are getting away with something, but because they put in evidence that went unchallenged by Mr. Dondero and the Plaintiffs. It simply went unchallenged. And they say, oh, gee, that's because we didn't know. Well first of all, you didn't ask. And second of all, again, the source of the inside information, the reason that Mr. Seery should have known the asset was worth more. The reason that he should have refrained from trading and not engaged in insider information was Paragraph 127. It was Mr. Dondero.

Here's another thing. If -- if again Mr. Seery had not been honest with the Court and that was ever brought out, Maybe HarbourVest -- maybe HarbourVest would have had a right to complain. There's a lot in the complaint about oh, HarbourVest was misled. The actual evidence that's in the record, and this is part of res judicata, Mr. Seery testified very clearly to the arm's length negotiation that took place. He told the Court under oath that the negotiations were contentious.

He told the Court under oath that in order to try to

resolve the case, he and Mr. Pugatch went off and had their own private conversation without lawyers. They could have taken discovery on any of that, right. What did you guys talk about? It's certainly not privileged. They had every opportunity. But what we do know is that Mr. Pugatch under oath, in deposition, and at trial, said the value is $22.5 million.

So I don't think Mr. Pugatch or HarbourVest is ever, ever, every going to complain about the transaction they did. Because of what the evidence simply shows. But again, you've got the Plaintiffs in their complaint saying that somehow the debtor and Mr. Seery in negotiating this transaction has now exposed the debtor to liability. It just makes no sense.

So there was a time and there was a place to challenge Mr. Seery. Somebody, you know, maybe HarbourVest could have done something, maybe they could still do something. I don't know. If they really think that there's a problem, maybe we'll hear from HarbourVest someday. But the Plaintiffs have no right to complain. They just don't. They knew everything. They were the source of the inside information. They sat on their hands, and they shouldn't be allowed to do what they're doing now.

If we can go to the next slide. I want to move to the next theory and try to finish this up. The next theory is that the Plaintiffs' claims are barred by judicial estoppel. The judicial estoppel argument is really, really very

straight-forward. And it's important because if the Court thinks about this the way I do, it's that the whole issue of valuation is completely irrelevant to the Plaintiffs unless they can show that they were owed some kind of duty, that they had some superior right to acquire the asset. But that's exactly the issue that CLO Holdco relied upon and withdrew and should now be estopped from pursuing. Right.

The legal standard, again the parties agree on, that in order to be estopped, the party must take an inconsistent position. And the party must have convinced the Court to accept that position. Again, both prongs are easily met here in just a few sentences from the January 14 hearing. You have Mr. Kane saying that he understands and acknowledges and admits that they have no superior right to the investment. And the Court relying on that very representation in declining to conduct a hearing and render a ruling on the merits of the claim that was withdrawn. The objection that was withdrawn.

And for the avoidance of doubt, after Mr. Draper spoke on behalf of the Trust, the Court, at Page 22 engaged in the following colloquy. The Court asked Mr. Draper:

"THE COURT: Were you saying that the Court still needs to drill down on the issue of whether the debtor can acquire HarbourVest's interest in HCLOF.

"MR. DRAPER: No.

"THE COURT: Okay. I was confused whether you were

saying I needed to take an independent look of that. Now that the objection has been withdrawn of CLO Holdco, you're not pressing the issue.

"MR. DRAPER: No. I am not."

Okay. You can call it res judicata, you can call it judicial estoppel, collateral estoppel, the two prongs are easily met. They're taking an inconsistent position today and through all kinds of different theories, including the one that they withdrew, the Plaintiffs assert that they had a superior right to acquire the interest from HarbourVest.

And they should have asserted those rights at the hearing. That was the time. And they should be estopped now from taking a completely inconsistent position from the one that was before the Court. And I just do want to point out, the statement from a case called Hall vs. G.E. Plastic. And it's interesting, Your Honor, because there's only a few cases that I focused on, because this is really more fact intensive. And there isn't a dispute as to the, you know, the elements of these matters.

But it is interesting that the Plaintiffs, you know, generally ignore all of the cases that we cite to. One which is Hall vs. G.E. Plastic, where the Court said that the focus on the prior success or judicial acceptance requirements is to minimize the degree of a party contradicting a Court's determination, based on a party's prior position. That's the

whole point of the exercise. You can't do this. You can't do this.

Just quickly, that leaves the individual arguments as to each of the five causes of action and I just want to go through some highlights. There's a negligence claim, Your Honor. And we did not file a pleading, but the Court can certainly take judicial notice of the fact that the effective date has occurred. Under the effective date, the plan is now effective. That includes the exculpation clause, as Mr. Pomerantz, I think accurately and without contradiction pointed out earlier, the exculpation clause applies specifically to the debtor and to negligence claims. And that's not a matter that's at all subject to appeal.

So I think just to add to the arguments that we have in our papers, which I adopt and do not abandon for any purpose, I would add to the argument on negligence, that it's now precluded, as a result of the plan becoming effective.

The fiduciary duty count suffers from numerous defects. I just want to point out a couple of them. They don't respond to the argument under Corwin, that under the Advisor's Act, there is no private right of action to sue for damages arising from a breach of fiduciary duty. This claim rears its head in virtually every single complaint. They've never addressed Corwin. Corwin is binding on this Court, and it is unambiguous that there is no private right of action to sue for damages for

breach of fiduciary duty under the Advisor's Act.

They ignore Goldstein. Goldstein is not from the Fifth Circuit, but it's very persuasive authority that advisors do not owe fiduciary duties to their individual investors. Instead, they owe fiduciary duty to their client. Their client is the entity with whom they're in contractual privity. And so in this case, there's no fiduciary duty there, either.

The breach of contract claim. Again I just -- I would just say quickly, Your Honor, it's barred under judicial estoppel. Even if it wasn't, it's clear based on Mr. James' analysis and admission that the debtor's, or the reorganized debtor's interpretation of 6.2 is accurate. And you know, I said this in the beginning. Now let me tie it in a bow because the breach of contract claim, and the tortuous interference claim are both tied to the same thing. And that is the assertion that the Plaintiffs had a right under the membership agreement, a right of first refusal.

And they basically say that the debtor was playing games. That they shouldn't be able to get through 6.2 by assigning it to an affiliate. And that's where I go back, Your Honor, and just remind the Court that the debtor told the whole world exactly what they were doing in their motion. And their objections, Mr. Dondero and the Trusts both acknowledge to the whole world that they understood exactly what was happening.

In fact, their concern was not that it was going to

the debtor, but that it might be going to an affiliate outside of the bankruptcy court's jurisdiction. And for them to now say, having taken all of those positions -- talk about inconsistent positions. They should be barred from saying today, that the use of an affiliate to effectuate the transaction was wrongful, because they actually told the Court that they needed to -- that the Court needed to make sure that it had jurisdiction over the very entity they now say somehow shouldn't have been allowed to get the asset.

It's a bit much. So that takes care of the tortuous interference.

The RICO claim, Your Honor, again is a motion. There's so many different aspects to it. But I don't think the Court needs to get past the Supreme Court holdings in HJ, Inc. Again, just simply ignored by the Plaintiffs in their opposition to the motion to dismiss. In HJ, Inc., the Court -- the Supreme Court did an exhaustive analysis to try to determine and ultimately did determine, what a pattern of racketeering activity meant. And the Supreme Court came to the following formulation. That it had to have two or more predicate related offenses that amounted to a threat of continued criminal activities.

You know, the notion here is that the debtor and Mr. Seery engaged in insider trading. We've already -- I've already mentioned that according to the complaint, which the

Court can take as true. Mr. Dondero, himself, was the tippee. But be that as it may, they don't come close to meeting the very high standards set forth by the Supreme Court in HJ, Inc. to show that whatever conduct Mr. Seery and the debtor engaged in, and if you take the allegations as true, in not telling what the fair value of the asset was, that that doesn't amount to a hill of beans for purposes of RICO. That you don't have any, I think predicate acts. I think here's the Court, predicate acts extending over a few weeks or months, threatening no future criminal conduct, do not meet RICO pleading grounds. Right.

Security fraud claims cannot be predicate acts for purposes of RICO. That is also clear. And that is really, I mean they say mail, wire and fraud. But what's really at heart is the 10(b)(5). Okay, it's the 10(b)(5) claim. Again, Mr. Seery being -- I mean Mr. Dondero being the tippee. But those are just some of the reasons.

None of, you know, that the RICO claim fails. You know, I'll otherwise rely on the papers, unless the Court has specific questions as to any of the other pieces of the motion to dismiss the RICO claim, or any other aspect of the Defendants' motion. I think this is clear. I think we win, no matter how you slice it. It's just wrong. It's just wrong.

This Court will never, ever have a final order if Mr. Dondero is able to engineer complaints such as this, which seek

to assert claims that absolutely positively could have and should have been brought at the time the debtor made its motion.

Unless the Court has any questions, I have nothing further.

THE COURT: I do not. All right.

Mr. Sbaiti, I'm going to let you have as much time as Mr. Morris. He took 55 minutes. As I mentioned, I have a hard stop at 12:00 to do a swearing in ceremony. So if you're not finished in 40 minutes, then I'm going to have to take a break and come back and let you finish. All right?

MR. SBAITI: Thank you, Your Honor. Although I don't think I'm going to be much longer than 35-ish minutes.

THE COURT: Okay.

MR. SBAITI: if not less.

THE COURT: Okay.

MR. SBAITI: I think you'll be able to be done by -- we'll be able to be done by noon.

THE COURT: All right. Thank you.

MR. SBAITI: Thank you, Your Honor. Your Honor, may I share my screen?

THE COURT: You may.

MR. SBAITI: Thank you, Your Honor. Do you see my Power Point, Your Honor?

THE COURT: I do.

MR. SBAITI: Thank you, Your Honor. I don't know what which one you see. Is it the --

THE COURT: I see presentation.

MR. SBAITI: With the full page?

THE COURT: Yes, uh-huh.

MR. SBAITI: Okay, yeah, great. I just want to make sure we're on the right page. Thank you, Your Honor. So Your Honor, the defendant debtor is a registered investment advisor. And it all begins with that. And this where the distinctions between what happened in the 9019 and I'll get to the elements of res judicata through argument.

But the first thing that has to be identified is that the Defendant is a registered investment advisor. The objection filed by Holdco back during the 9019 was an objection against HarbourVest selling its interest by filing the right of first refusal. It did not deal with the investment advisor feature of Highland's relationship. And I'll get to why the 9019 doesn't preclude these arguments today.

This is essentially the structure. Highland was the investment advisor of HCLOF, and Holdco is an investor in HCLOF. And so Highland would owe a fiduciary duty under the Advisor's Act against -- to CLO Holdco.

Highland also had a direct advisor relationship with the DAF. And so under the Investment Advisor's Act, it owed fiduciary duties to both of those entities. The law governing

registered investment advisors is that it's a federally recognized and defined fiduciary duties. The fiduciary duty to there's a fiduciary duty to affirmatively keep the advisee informed and the fiduciary duty not to self-deal, i.e., not to trade ahead of an advisee and opportunity that an advisee would want or expect and without the advisee's expressed informed consent.

This is a federally recognized and defined fiduciary duty and it's actionable under state fiduciary duty laws. While Mr. Morris ended his argument by saying we didn't deal with their case law saying that there's no private right of action under the Advisor's Act, the fact of the matter is that Judge Boyle, about ten years ago, found that a state -- the breach of fiduciary duty claim can be predicated on breaches of federally imposed fiduciary duties under the Advisor's Act. And that's what Douglass v. Beakley held. And that's actually what we cited in our response. So I'm not sure why he would argue that we haven't addressed the issue of where does this private right of action come from.

Federal Law supplies the rules of the relationship and State Law provides the cause of action for those breaches. Now the scope of that has been expounded upon by many cases. The Fifth Circuit held in Laird, as a fiduciary, the standard of care to which an investment advisor must adhere imposes an affirmative duty of utmost good faith and full and fair

disclosure to all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading his clients.

The word "affirmative" there is important because it means the investment advisor is not supposed to wait to be asked. The investment advisor as an affirmative duty to proactively provide the information to the client.

The next standard comes from the SEC. We call it the SEC interpretation letter. It's a release that came out in 2019. And to meet it's duty of loyalty, an advisor must make full and fair disclosure to its clients of all material facts relating to the advisor relationship. Material facts relating to the advisor relationship include the capacity at which the firm is acting with respect to the advice provided.

The SEC had another release in 2000 -- or excuse me, in that same release, the SEC said the duty of loyalty requires that an advisor not subordinate its clients interests to its own. In other word, an investment advisor must not place its own interest ahead of its clients' interests. An advisor has a duty to act in the client's best interest, not its own.

The SEC general instruction three to part 2 of Form ADV, that every investment advisor has to pull out. And this is cited in our papers. As a fiduciary, you must also seek to avoid conflicts of interest with your clients, and at a minimum, make full disclosure of all material conflicts of

interest between you and your clients that could affect the advisor relationship. This obligation requires that you provide the client with sufficiently specific facts, so that the client is able to understand the conflicts of interest you have, and the business practices in which you engage, and can give informed consent to such conflicts or practices or reject them.

And, finally, the Third Circuit in Belmont said:

"Under the best interest test, an advisor may benefit from a transaction recommended to a client if, and only if, that benefit, and all related details of the transaction are fully disclosed."

These fiduciary duties are unwaivable by the advisor. Any condition, stipulation or provision binding any person to waive compliance with any provision of this subchapter, or with any rule, regulation or order thereunder shall be void.

So the lawsuit does not allege that the HarbourVest settlement should be undone or unwound. I'd like to move to that point. Mr. Morris says well, you have to unwind half of the settlement. Maybe HarbourVest doesn't have to give back what it got, but Highland would still be saddled with the cost of the settlement, but not with the benefit of the settlement.

Well, actually that's not true. There's two points that we would make on that. Number one, our suit is a suit for damages. In other words, the suit would be a suit for money damages, based on the difference between the value of the asset

and what HarbourVest or what the actual value of the asset that was represented, $22.5 million. So the second point, though, is that even under a situation where CLO or Holdco or the DAF, or even HCLOF were to purchase the HarbourVest suit, the expectation would obviously be that they'd pay the $22.5 million that Highland paid for it.

So Highland is -- so it's not unwinding, and there's no saddling Highland with a burden that they didn't otherwise have, I think that's a misrepresentation. But we're not seeking to unwind the lawsuit -- or excuse me, unwind the settlement.

Now Mr. Morris is correct, the representation of value by Mr. Seery is -- is one of the main points here. And the representation was that the value of the entire asset. Not just the shares of MGM, but the value of the entire asset was $22.5 million. So in other word, nearly half of HCLOF was represented to be worth $22.5 million. It was argued by counsel on Page 14 of the January 14th transcript, and then on Page 112 of that transcript, Mr. Seery specifically says the current value is right around $22.5 million.

Now that was also in some of the filing papers and Mr. Morris put up the evidence to Your Honor that Mr. Pugatch, on behalf of HarbourVest also parroted that number. But there's not any evidence today about where that number came from, or whether he was simply relying on Highland's

representation of that value.

Now as a general rule, in these 12(B)(6) motions, as I said before, we don't look at the evidence because the whole point of discovery is to find out what's behind a lot of the evidence. That's been quoted. The amount of evidence that went into the 9019 motion as not necessarily full-blown discovery.

I understand Mr. Morris saying well, they could have asked the question. But as I just showed you, they shouldn't have to ask the question. There should be fair and full disclosure of all the material facts. And if it turns out, which we believe it is true, that by January, the value of HCLOF was twice what it was represented, or the HarbourVest portion of HCLOF was twice as to what it was represented, that's a material omission that Highland had an affirmative duty to not misrepresent. Irrespective of the questions being asked.

The DAF found out later on that the representation of the value wasn't true. Now Mr. Morris talked for a very long time about all the opportunities that somebody, Mr. Dondero, somebody other than CLO Holdco. In addition to CLO Holdco, could have asked the magic question to find out whether or not they were telling the truth. But that runs right in the face of the standards set forth by the SEC and by the Courts as to the affirmative obligation of an advisor to disclose all the

material benefits that they're going to get as part of a trade. The idea being that when you're a registered investment advisor and you want to engage in a transaction, you make a full disclosure and say this is the transaction. It's worth 41, but I'm paying 22-1/2. But here's why I'd like to be able to do it. And then that's the discussion that happens.

That clearly didn't happen here. And when it turned out that there was this entirely huge upside that they were gaining the benefit of, and maybe HarbourVest didn't care, that that was a false statement. Now the reason we don't have a common law fraud claim, or that we don't necessarily hang our hat on a fraud claim is we don't have enough evidence as it stands today, to specifically say that Mr. Seery intentionally misrepresented that. Although we believe that it was grossly reckless of him to do so. But we don't really need a fraud claim with a gross recklessness standard. We have a breach of fiduciary duty, which basically gets us to the same place.

So the timeline we have is September 30th was the last valuation of HCLOF assets provided by HCMLP. And the value of HCLOF, at that time, or the HarbourVest of that value, would have been about 22.5 million. So what it appears to be is that in January or in late December, the valuation that was being done -- what was being reported, wasn't the current valuation. It was the valuation as of the end of the third quarter of 2020.

On December 22nd, the motion to approve the settlement with HarbourVest was filed. HCMLP should have had or would have had up-to-date valuations of the HCLOF assets, but didn't necessarily disclose them as being different than the 22.5 million. On January the 14th, Your Honor, held the 9019 hearing. And then that same day, Your Honor entered the approval order.

And finally, in March, the DAF learns the true value of HLOF assets as of January 2021 and starts to look into it. Now Mr. Morris makes much of the fact that well, Mr. Dondero at least knew that he had tipped them off, Mr. Seery. And if you actually read Paragraph 127, you'll see specifically what it's purported that he said. He said stop trading in the MGM assets, because MGM might be in play. So you can't trade because I'm an advisor, Mr. Dondero's an insider, he's the tipper, not the tippee. Mr. Seery becomes the tippee under that theory of the case, and he has to, and is required to, because of their affiliation at the time, he's required to cease trading. And that was the purpose of saying that.

The collateral issue that we point is that he at the very least knew about that, and that should have caused him to revalue, if he hadn't done so at the time. Not that, knowing that alone is sufficient to know what the value of HCLOF actually was on that date. That's a complete misrepresentation of the point and purpose of that allegation.

And as Your Honor knows, under 12(B)(6) jurisprudence, the way this is supposed to go is we get the benefit of every inference based upon the allegations, not the movant. So the first violation is that the debtor as an IRA failed to affirmatively disclose the true current valuation of HCLOF and failed to keep the DAF and CLO Holdco reasonably informed of the value of the assets.

And the debtor as an IRA, failed to obtain CLO Holdco's with the DAF's informed consent before it traded in the asset, because it didn't have all of the information. The typical remedy for breach of fiduciary duty is typically damages for any loss suffered by the Plaintiff as a result of the breach. I don't think there's a debate there.

So now we get to Mr. Morris' key argument. His key argument is that we should be talking about res judicata. The elements of res judicata and I think we agree is you have to have identical parties in the action; the prior judgment was rendered by a Court of competent jurisdiction; the final judgment was final on the merits, and the cases involved the same causes of action or the same transaction and nexus of facts.

Now I'm going to skip to three, because I think that's one of the key points that we disagree with them on. There is no case, Your Honor, that we could find, and no case that I read them citing that says an order on an 9019 has

preclusive effect under res judicata under an objector to the settlement. We looked. We looked in the Fifth Circuit. We looked outside of the Fifth Circuit. No District Court, no Fifth Circuit Court of Appeals' opinion we could find held that a 9019 order has res judicata effect on an objector's objection. And I think the reason is pretty simple. Is it doesn't.

Because the Plaintiff's claims, here our claims hadn't even accrued. We have a four year statute of limitations, but I think more importantly is that, as the Fifth Circuit said, the 9019 motion grants the Court discretion. It's not supposed to be a mini trial. The Court can approve a settlement over even the valid objection of an objector. It's not a trial on the merits. It's not supposed to be a trial on the merits. It's not supposed to be a disposition on the merits.

So the fact that Your Honor could have approved the 9019 settlement with HarbourVest, even if we had a valid objection, means this isn't a disposition on the merits, as res judicata would envision. It wasn't a trial on the merits, even though it was withdrawn.

The other elements that we would point out to is that neither the DAV nor Holdco were parties to the dispute between HarbourVest and Highland. And this keys off of the issue that I just raised. The cases that are cited by the debtor to Your

Honor all have to do with where one of the settling parties is trying to undo the settlement for some collateral reason. And the Courts have held, no, that's res judicata, because you were a party to the action. HarbourVest brought the claims against Highland. Highland settled those claims.

CLO Holdco was collateral to that settlement, it's not a -- excuse me, collateral to that dispute. It's not a party to that dispute. Its claims weren't being resolved by the settlement. And while you have a notice to all creditors and those objections can be raised, there was not inherently any manner for resolving those objections on their own merits. Only -- it was only resolved in so far as deciding whether or not the settlement was in the best interest of the debtor, which Your Honor decided, and we don't challenge that. But we do argue that it caused damages and the debtor shouldn't get off for those damages.

The fourth element is that the --

THE COURT: Just for the record, the standard in a 9019 context is not best interest of the debtor, right?

MR. SBAITI: Your Honor, I mean that's what the rule says and Your Honor's order --

THE COURT: That is not what the rule says. The rule is actually very sparsely worded and then we have Fifth Circuit case law and U.S. Supreme Court law that talk about what the standard is.

MR. SBAITI: Yes, Your Honor. And there are five --

THE COURT: And it's -- is it fair?

MR. SBAITI: There are five elements.

THE COURT: Is it fair and equitable and in the best interest of the estate given a long list --

MR. SBAITI: Correct, Your Honor. And I didn't mean to --

THE COURT: -- of considerations that the Court is supposed to consider that "bear on the wisdom of the settlement." Okay. So it's actually much more involved, is my point, than is it in the best interest of the estate. Is it in the best interest of the estate and fair and equitable given all factors bearing on the wisdom of the compromise? And then we have a long laundry list of things the Court should consider as part of that analysis.

MR. SBAITI: That's a --

THE COURT: I just bring that up because if I'm still -- my brain is still stuck five minutes ago on your comment that you can't find any case saying that an order approving a 9019 compromise has res judicata effect on creditors. And it's -- let me just say it's shocking to me that someone would argue otherwise. Bankruptcy is a collective proceeding --

MR. SBAITI: Your Honor --

THE COURT: -- where creditors can weigh in and object and raise whatever arguments they think the Court should

consider that bear on the wisdom of the compromise. And the Fifth Circuit in Foster Mortgage has said the Court should give great deference to the views of the creditors, the paramount interest of creditors.

So it's a really sort of shocking proposition that the order approving a 9019 compromise wouldn't have res judicata effect on all parties and interests who got notice of that. So if you have any elaboration on that, I'd like to hear it.

MR. SBAITI: Your Honor, we looked at the Fifth Circuit cases that they cited, which I believe included that case. And even in that case, the point that we made in our papers and the point I was trying to arrive at is that among the factors, yes, the Court should give great deference to the creditors. But among the factors is not that the objections lack merit or are meritless or that they wouldn't be winnable if they were simply standalone claims.

And that was really the only point I was trying to make is that Your Honor has discretion. Granted it's -- as you mentioned, it's not unfettered discretion. It's bounded by standards and there are -- there is, I know, about five standards Your Honor has to consider or the Court has to consider. But among those, that laundry list of standards, is not that the Court finds that any objection lacks merit. And that was really the only point I was making.

And in terms of the case law, we looked at the Fifth Circuit. We looked, frankly, outside the Fifth Circuit as much as we could, and because this is actually not an easy one to research, as it turned out, despite the language. And we also looked for district court opinions in the Fifth Circuit to see did any district court or did any court of appeals give this type of approval to the standard that a 9019 order has res judicata effect on a claim raised in an objection by a creditor.

And we couldn't find any and I read all the cases that Mr. Morris cited in his papers, and they didn't cite one that explicitly said that. They tried to drive at it through insinuation that, well, if the Court has to give great deference or if the Court has to take into account the underlying facts and the fact that there is discovery, surely that must mean this is akin to the trial on the merits. And I think that's where we simply disagree in good faith. I'm not ascribing any bad intention. But we disagree that that's where the law goes.

Res judicata is not -- while it's supposed to stop the relitigation of issues, it is predicated on there having been actual litigation of those issues. And when HarbourVest and Highland settle a case and my clients show up with an objection, even though they withdraw an objection, that, in our opinion -- and we're asking the Court to see it our way -- is

not trial on the merits. It's not a disposition on the merits of the objection in and of itself. Some objections we can --

THE COURT: But the context matters. In the context of a 9019 compromise, the hearing is about look at the bonafide ease of the settlement. And it's either fair and equitable and in the best interest of the estate or not. And an objector can say this is a terrible settlement and here's why it's a terrible settlement and let me cross-examine the movant and let me put on my own witness that will enlighten the Court as to why this is a terrible settlement, why I say terrible, why it's not fair and equitable.

That's your chance to convince the Court, don't approve this settlement because there are, you know, 14 problems with it. And if you convince the Court, then you convince the Court and it's not approved. If you don't, you appeal, and we do have an appeal of the settlement order.

So, again, I'm not understanding the "res judicata doesn't apply" argument.

MR. SBAITI: Your Honor, if I could riff on two points based upon what you just said, if I could address those.

The first is there are clearly two kinds of objections that get -- at least two kinds of objections that get raised in these 9019 approval hearings. The two that you heard recounted, some were this is bad for the estate. There's reasons why we don't think the estate will benefit from it and

it will be harmed from it.

And those types of objections, which I believe mostly comprise the objections that Mr. Morris was talking about because they are concerns for the estate. And so creditors who want to get money from the estate are concerned that the settlement will not enter (phonetic) to the benefit of the estate, and therefore, not enter to their benefit as creditors. That's number one.

But those don't adhere in a lawsuit. Those aren't claims for damages that the settlement is going to create for the person objection or for the party objecting. There's a whole separate set of objections similar to the ones HCLO Holdco raised where that what inheres in the objection is this is actually going to cause us some kind of damage.

And so, the factors though, don't require the Court in those second set of instances to say, well, you know what? Not only do I think you're wrong, but I think that your lawsuit, the underlying causes of action that give rise to this objection, have no merit on their own face, that the discovery is not there to support them, that a jury is not going to find there. I am now the trier or the Court is now the trier of fact on the merits of the underlying causes of action that animate the objection.

And that's where I believe we're diverging with the debtor on the law. It goes too far to say that a 9019 hearing

where the Court in the end has discretion to approve it, even over a meritorious objection by any party, regardless of what bucket of objections the objection falls into. It goes -- our argument today, Your Honor, and we're asking the Court to see it our way, is that that would go too far. That an actual cause of action shouldn't be eradicated simply because of the 9019 process because, as you pointed out, the Court does have to go through a litany of factors.

And if the Court determines that it's fair and it's more equitable to overrule the objection, the Court has that discretion. And we're not here to unwind that discretion.

But the settlement process did violate certain obligations and did cause my client damages. And that's what we're saying isn't precluded.

THE COURT: Okay.

MR. SBAITI: The fourth element, Your Honor, which I guess in many ways maps on to the argument I just made to Your Honor is that the cases, the underlying cases, do not involve the same claims. Plaintiffs' claims arise from the settlement process itself and not from the underlying issues being settled between HarbourVest and Highland. So that's why we think at least three of the four elements aren't met here. And we'll reserve on the papers, you know, whether jurisdiction was applicable because I think that's probably water under the bridge at this point in the oral argument.

Now, Mr. Morris attacks the case that we cite, Applewood Chair vs. Three Rivers Planning. And he argues that, well, this is not applicable. And the argument he made however was he put it in the context of, well, the parties there, the issue was you had guarantors who were not parties in their capacity as guarantors. But that's not actually what the Court held.

The Court didn't say that the release wasn't applicable to them because they didn't appear as parties in their guarantee capacities. They -- the Court held that, well, the specific discharge language doesn't enumerate those specific guarantees, and so therefore it's not released.

And where this dovetails, we believe, as closely as we can, this isn't a 9019 case. This is a final confirmed plan. But where it dovetails with what our argument is, is that the Court there as well was essentially saying the underlying causes of action weren't really presented to us, so we're not -- we -- and the confirmation of the plan didn't involve disposing of them, so we're not going to say that they are precluded. And we think that that's as close an analogy as we've found in the Fifth Circuit to the issues here today.

So I would say, Your Honor, that we believe that dispenses with the res judicata argument. The judicial estoppel argument, they conflate the language. I'll go back to this for a second. They conflate the language of judicial

estoppel on the success of the claim. None of the cases they cite on judicial estoppel involved where a party took a position, withdrew their argument, and then the Court moved on.

Mr. Morris tries to convert a judicial estoppel claim into a judicial reliance claim, which is not the purpose of the doctrine and is not the doctrine at all. The doctrine is that if you take a successful position in one court, you can't take the opposite position in another court. CLO Holdco didn't take a successful position in one court and then change its position later on. In fact, its positions, as Mr. Morris stated, are remarkably similar. They're not inconsistent, which is the problem with their judicial estoppel argument. And we -- I think we fairly briefed that in our papers and we'll otherwise rest on the papers.

To deal -- to address the actual claims, again, I come back to the idea of a fiduciary duty claim, which is our lead claim. And to be clear, it's a state claim predicated on the violation of federally imposed fiduciary duties.

And I'm looking for a clock to make sure I'm not abusing Your Honor's time, and I don't have one right in front of me because my screen -- my screen is up.

Your Honor, the Douglass v. Beakley case is, like I said, is Judge Boyle's case. It specifically provides a cause of action based upon violations of the Advisers Act. We also cite about four or five other cases in footnote 8 of our

response from other circuits, including the Third Circuit, the Belton case that I referred to earlier, all of which held that, yes, a state fiduciary duty claim can be predicated on breaches of a federal Advisers Act violation.

The other point that they make on the fiduciary duty claim is they argue HCMLP doesn't owe fiduciary duties to CLO Holdco. And the cases they cite, Your Honor, we dealt with in the papers why they were distinguishable, because in those cases they were dealing with the fact that there wasn't any harm or any direct relationship. But what they ignore is the actual language of the Advisers Act, which is important.

Well, first of all, Mr. Seery admitted in his own testimony during the approval hearing in July of 2019 that he says, "We owe." He says, "There are third party investors in the fund -- in these funds who have no relation whatsoever to Highland, and we owe them a fiduciary duty both to manage their assets prudently, but also to seek to maximize value." I think Mr. Seery was absolutely correct when he said that. Highland owes fiduciary duties to the investors in the funds that Highland manages. The core of our case is that Highland is using or abusing the assets of the funds it managed in HCLOF for its own enrichment, which is a classic breach of fiduciary duty case under the Advisers Act.

Now -- excuse me. The other point that I would say, Your Honor, is that there is a statutory basis for us to argue

a breach of fiduciary duty. Excuse me. I didn't mean to stop sharing. I apologize.

Are you back with me, Your Honor, on my --

THE COURT: Yes.

MR. SBAITI: -- PowerPoint?

THE COURT: Yes.

MR. SBAITI: Sorry about that, Your Honor. I just hit the wrong thing. I'm not very technologically savvy. Here we go.

So Holdco is an investor in HCLOF, which is a pooled investment vehicle. A pooled investment vehicle under the case law we cite is simply defined as an investment vehicle that doesn't publicly solicit investors and has few than 100 investors. Highland advises it. That's the same holding in TransAmerica Mortgage, by the way, which we also cite.

15 U.S. C. Section 80(b)(6) establishes the federal fiduciary standards to govern the conduct of registered investment advisers. That's also the TransAmerica case. 15 U.S.C. Section 80(b)(6)(D) delegated to the SEC the power to decide the scope of those duties that are imposed under the statute. And so the SEC enacted 17 C.F.R. Section 275.206(4)-8.

And it expressly states, and we cite the statute or the regular in full in our papers, that the fiduciary duties are owed to investors in the pooled investment vehicles. It

specifically says that. It talks about two different duties owed and they're owed to the investors in the vehicles, which means they're owed to Holdco as an investor in HCLOF, which is the vehicle that Highland manages.

It's black and white in the regulation. And we haven't seen any response. There was no response of that in the reply that was filed, Your Honor. And so the argument that there's not a fiduciary duty owed to Holdco because it's merely an investor in HCLOF simply doesn't comport with the law.

And finally, the petition lays out the basis for our claims including the applicable federal and state law. Plaintiffs' response lays out why the legal arguments aren't opposite at the 12(b)(6) stage and Rule 9(b) is met where necessary under the federal claim. And I'm trying to unshare so that I can get back to regular argument.

I'd like to briefly address Mr. Morris' argument, Your Honor. Your Honor, I re-raise my argument that I made before, which is that a 12(b)(6) motion and hearing is not the appropriate time for all the evidence that was poured in here. And I understand Mr. Morris' contention, well, it's really hard to ignore all the history of this case. But a lot of that history really boils down to things that were actually admitted in the complaint. The complaint recognized there was a 9019. But what Mr. Morris wants to do is go beyond that and to go to what people said and what they must have meant. What Mr.

Dondero must have meant in his objection, what Dugaboy must have meant by their objection, what Mr. Pugatch must have meant by his testimony.

All of that is highly improper at this stage of the proceeding, Your Honor. It's outside of the 12(b)(6) confines. It's outside the four corners of the complaint. And we object to all of that evidence being considered.

THE COURT: Let me --

MR. SBAITI: The question we --

THE COURT: Let me ask you about that procedural point.

MR. SBAITI: Yes, Your Honor.

THE COURT: As we know, 12(d) provides that if matters outside the pleadings are presented to and not excluded by the Court in a 12(b)(6) motion, the motion must be treated as one for a summary judgment under Rule 56 and all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Are you -- what are you arguing? That I should treat it as a motion for summary judgment and give you more time to present other materials? I mean, you both presented an appendix, okay. And I'm telling you we're seeing this more and more, I've noticed. People are going beyond the four corners of a motion to dismiss and attaching things. And there's some, you know, Fifth Circuit authority that says, well, if what is

attached is integral to understanding, you know, an allegation or whatever in the pleading, you know, there is some discretion to go outside the four corners.

So I'm trying to understand the point you're making with this. Are you saying I should treat it as a motion for summary judgment or do these attachments really -- you know, do I have authority under the Fifth Circuit to consider them as part of the 12(b)(6) motion or not?

MR. SBAITI: Typically, in our experience, Your Honor, is when a summary or when a 12(b)(6) is going to be treated as summary judgment under 12(d), the Court says that and then the parties are given an opportunity, as you said, to go do some discovery in order to put together the evidence and materials to then come back and respond as a summary judgment. We responded to a 12(b)(6) and objected to the evidence. If the Court wants to treat it as a summary judgment, then we would ask for an opportunity for -- to conduct discovery in order to be able to respond as a summary judgment motion, but we didn't -- because we responded to a 12(b)(6) --

THE COURT: You did the same thing though. You did the same thing in your response. You submitted an appendix of evidence, if you want to call it evidence. As someone pointed out, it's stuff from the bankruptcy court record. I don't think it went beyond what was already in the bankruptcy court.

MR. MORRIS: And if I -- can I be heard on this, Your

Honor?

THE COURT: You can. You can.

MR. MORRIS: Just to respond. This is really quite simple. The motion to dismiss is based on res judicata. Res judicata necessarily requires a review of what happened in connection with the prior hearing. There's nothing that we have identified or put forth in the appendix or on our exhibit list except for the pleadings in the 9019, the transcripts, the one deposition transcript, the one trial transcript, the settlement agreement, the transfer agreement. I'd love to know what the Court couldn't or shouldn't take judicial notice of. There is no emails. There is no -- there is no -- there is no extrinsic evidence, if you will. All of this is either on the docket or was presented as part of the hearing.

THE COURT: Yeah. I'm just trying to ferret --

MR. MORRIS: And it's necessary. And it's necessary for the motion.

THE COURT: Yeah. I'm just trying to ferret out the procedural position that's being asserted here. And I don't have the case cites off the top of my brain, but there is authority from at least the Northern District judges, if not the Fifth Circuit, saying in a 12(b)(6) motion I can take judicial notice of items in the record. And then, you know, there -- I know there's Fifth Circuit authority saying I can go beyond the four corners in a 12(b) context if it's just basic,

you know, explaining things that are in allegations. You know, such as --

MR. SBAITI: May I address that, Your Honor?

THE COURT: -- such as if a contract is in dispute, okay. Like there's no way you can have a cause of action under the contract and here's the contract. So I'm just trying to nail down your procedural position here.

MR. SBAITI: Your Honor, the distinction I was trying to make that I don't think I put as artfully as I might be able to put now is in a 12(b)(6) if there's a contract, as you said, if there's a legal document, a contract and order that's integral to the case, Your Honor can take judicial notice of that. Generally, a court can take judicial notice of filings in a bankruptcy, the fact that they were filed.

So the transcripts, which Your Honor can't take judicial notice of, is the truth of those. And that was what I was objecting to is it's one thing for him to say an objection was filed and therefore, because an objection was filed, that should be it. That was your only chance. I'm not saying Mr. Morris can't make that argument.

But when he goes beyond the fact of the filing or the fact that there was a transcript or the fact that there was a deposition and starts to read from the depositions or read from the filings and say this is what those mean, that goes against the 12(b)(6) parameters because, number one, now it's

substantive evidence and not simply a judicial notice of something that's right there in front of the Court, i.e., something on its own docket. Because those statements and the interpretation of those statements are subject to credibility findings. They're subject to clarification. They're subject to rebuttal. That's the purpose of discovery.

And so if Your Honor -- and Mr. Morris is right. Usually, res judicata involves knowing what happened in the prior proceedings. So if all he wants to do is rest on the fact that an objection was filed by CLO Holdco and maybe even other people, and that should be it and he thinks that's enough for Your Honor to say res judicata applies, then I don't think we have a problem. It's when he goes beyond that and says, Your Honor, these people must have known and this is what they meant by their argument, that's what I'm asking Your Honor not to consider. And if Mr. Morris wants you to consider that, that's a summary judgment motion and we should have the opportunity to do discovery at the very least into the issues he has now raised as supporting his res judicata defense which he has the burden of proof on.

MR. MORRIS: Your Honor, this is one of the strangest arguments I have ever heard. I'm allowed to offer the Court and the Court is allowed to accept the documents, but I'm not allowed to read them. I'm not allowed to make arguments. I don't understand what that even means. If it were a contract,

I would be allowed to put the contract in front of Your Honor, but I wouldn't be able to argue why the contract doesn't say what the Plaintiff says. I don't get it.

THE COURT: Okay.

MR. MORRIS: That's --

THE COURT: Just I've heard enough on this. I don't think we have moved into Rule 12(e), that realm of me needing to treat this as a motion for summary judgment. I think the so-called evidence, the appendix that was attached to the motion as well as the appendix that was attached to Plaintiffs' response, it's stuff that I can take judicial notice of that's in the record of this Court and I can look at it. You know, it is what it is, the record of this Court.

All right. So I have nine people waiting in chambers. I'm trying to figure out should I take a break now or are you fairly close to wrapping up. Either answer is fine, Mr. Sbaiti. I just need to figure out who I make wait here.

MR. SBAITI: I have -- oh, I'm sorry. I didn't mean to interrupt you, Your Honor. I was just going to say I have five minutes left, but I know Mr. Morris probably wants to come back. So if you want to break now and we can come back at whenever the Court wants us to, we can do so.

THE COURT: All right. Why don't you make your final five minutes and then we'll take a break?

MR. SBAITI: Okay. Thank you, Your Honor.

I just wanted to address some of the arguments that Mr. Morris raised in his argument. The first thing is -- and I addressed this in part -- but Mr. Morris makes a big deal about paragraph 127 of the complaint and essentially suggests that we're the -- or that Mr. Dondero is the perpetrator of a nefarious scheme. Whereas, what the pleading actually says, and I again encourage Your Honor to re-read -- to read it specifically, is that Mr. Dondero warned Mr. Seery not to trade in the stock and not to make any transactions because the stock was going to appreciate in value.

That has two implications for us, Your Honor. Number one, it means Mr. Seery was a tippee of insider information, and number two, it means that Mr. Seery, if he did trade on that information or if he did pass that information on to someone else, that is a problem from the Advisers Act standpoint, which is really the only purpose of saying that.

While paragraph 127 also says that that should have caused Mr. Seery to revalue the NAV of HCLOF, it does not state and we did not plead that the entire value of HCLOF is tied to the MGM stock. So the insinuation that that somehow gave us inside information about what the true value of HCLOF was and we should have known or that Mr. Dondero should have known is simply untrue.

The other argument Mr. -- that Mr. Morris likes to harp on is that CLO Holdco withdrew its argument, but he

characterizes Mr. Kane's withdrawal testimony -- as he says, Mr. Kane admitted that CLO Holdco lacked the superior right to obtain the HarbourVest. If you read the very language that was highlighted on Mr. Morris' slide, that's not what Mr. Kane says. Mr. Kane says, "We've gone back to the drawing board. We've read your reply. And my client has given me permission to withdraw the argument or withdraw the objection." That's all he said. There was not an admission that he was wrong. There was not an admission that they had made a mistake. There was simply an admission that they decided to withdraw the objection for whatever reason.

Lastly, on the specific claims --

THE COURT: That's not an accurate description of the record. He said he looked at --

MR. SBAITI: Your Honor, I was reading it along with him.

THE COURT: -- Guernsey Law. And I don't know if his words were deep dive.

MR. SBAITI: Yeah.

THE COURT: But he had looked at the agreements extensively. That's just not what he said.

MR. SBAITI: And he said he was with -- Your Honor, he said he was withdrawing. He didn't say we were wrong. He didn't say we don't have a claim. What he said was, "We're withdrawing the objection."

THE COURT: After doing an extensive look at the agreements in Guernsey Law, okay, so.

MR. SBAITI: Sure. But, Your Honor, he might have -- he could just as easily thought we have a chance, but it's not a good one. And frankly, we'll be here for 20 days and we're withdrawing it for that reason because we'll live to fight another day. Your Honor, there's an innumerable number. To simply say that he admitted that they didn't have a correct claim, it's just he didn't say that. That's all. That's the only point I'm making.

Your Honor, I don't disagree with the debtor that the Court's exculpation clause gets rid of the negligence claim which was obviously filed before the effective date, so that claim is gone.

And I think the last argument that Mr. Morris makes on the RICO claim is the federal court, the Supreme Court standard for pleading a RICO claim, that acts that only continue for a few weeks are not -- don't set out a RICO claim. Your Honor, in our response to that, we actually submitted an amended complaint that shows that the type of acts we're talking about, the pattern of the debtor using its investor vehicles assets to liquidate is a long pattern and practice than simply the HarbourVest suit. And so, we move to amend on that basis to satisfy that pleading defect, which is the main one that they focused on.

That's all I have, Your Honor.

THE COURT: All right. Thank you.

We're going to take a 15 minute break and come back. I'll ask Mr. Jordan and Mr. Bessette did they have anything they wanted to say today. I know they joined in the debtor's motion. And then we'll let Mr. Morris have rebuttal.

All right. So we'll be back in 15 minutes.

THE CLERK: All rise.

MR. MORRIS: Thank you, Your Honor.

(Recess at 12:05 p.m./Reconvened at 12:23 p.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated.

We're back on the record in Charitable DAF v. Highland Capital. All right. So I promised I was going to go back to counsel for Highland CLO Funding, Ltd. So Mr. Jordan, Mr. Bessette, is there anything you wanted to say for oral argument?

MR. JORDAN: Thank you, Your Honor. John Jordan on behalf of HCLOF.

Our points are two procedural points. The first is as the Court anticipated, in our motion to dismiss filed back in August, we joined in the motion to dismiss of Highland. And so to the extent that the Court after deliberation is inclined to grant that motion, we would ask that as a joining party, HCLOF be pulled along with that.

The second procedural point is that back in our motion to dismiss, we pointed out that the complaint does not actually allege anything against HCLOF. In the story, we're essentially the football and neither Oklahoma nor UT. And we pointed that out as an additional argument to what you've heard today. That motion was never responded to. The deadline by agreement was extended to October 11th. And the lack of response was, we believe, not inadvertent but simply an acknowledgment that HCLOF is not a party that anything is being claimed against.

It particularly makes sense since effectively and in rough numbers, they're half owned by both sides. So for every dollar that HCLOF spends hanging around the case, the parties are paying essentially 100 cents collectively. So for that reason, we would ask, and subject to Mr. Sbaiti's input, whether the Court would ask us or direct us to upload an order granting our motion as unopposed. We just feel like we don't have any role in this case.

THE COURT: All right.

Mr. Sbaiti, what about that?

MR. SBAITI: Your Honor, they were originally added as a nominal party. And as a nominal party, because of the potential need to have a derivative action, I think that based upon Highland's arguments and the arguments that we had, I don't think the derivative action is necessary for us to

maintain on a go-forward basis. And so we don't oppose them being dismissed.

THE COURT: All right. Then I assume, Mr. Morris, you don't have any problem with this, correct?

MR. MORRIS: No, Your Honor.

THE COURT: Okay. So I'll look for the parties to submit an agreed order of dismissal of HCLOF after the hearing. All right?

MR. JORDAN: Thank you, Your Honor.

THE COURT: All right. Mr. Morris, you get the last word.

MR. MORRIS: Thank you, Your Honor. I hope to be relatively brief. I really just want to focus on the arguments concerning whether or not the order that was entered by this Court was an order that was entered on the merits.

As the Court is well aware, a 9019 motion filed by a debtor is done so on notice. It is to give all parties in interest an opportunity to be heard, not just as to whether or not the debtor meets its burden of proof under Rule 9019 but whether or not the Court can find, as it must, that the proposed settlement is in the best interest of the estate.

The purpose of -- I mean that is the purpose of the giving notice so that everybody has a chance to be heard. The questions that the Court asked, the questions that every bankruptcy court asks in a 9019 is can the debtor do this deal,

should the debtor do this deal, is it in the best interest of the estate to do this deal.

And, you know, the idea that a 9019 order is somehow res judicata only to the parties to a settlement is just something that doesn't make any sense to me because it abrogates so many rules that exist that allows and encourages and requires parties who have objections to be heard.

Mr. Sbaiti's clients filed an objection. They initiated a contested matter. They obtained rights. They were litigants. They are litigants in a contested matter where they're required to tell the Court what objections they have to the settlement, and they did that.

Mr. Sbaiti, you know, told me that I wasn't allowed to characterize the words that are used in the documents that have now been admitted by the Court. And, yet, I heard him say that maybe Mr. Kane (phonetic) really meant to tell Your Honor that he was withdrawing the claim because he was going to save it for another day.

I'd just ask the Court to look at the transcript. I don't have to interpret it at all. And I'd ask the Court to read the words. I can put them back up on the screen, but they're pretty short. It's at Pages 7 and 8 of the transcript of what Mr. Kane told you and what you said in response. It's on the page, not my interpretation, and what the import of that was.

Mr. Sbaiti believes, I guess, if one is allowed to engage in such conduct without consequence, that one is allowed to allow to file objections, cause the Court and the litigants to participate, to give discovery, to write briefs, to do analyses, withdraw it on the basis of their own good faith analysis of Guernsey law of the documents and somehow say it's irrelevant. Not what the law is, not what res judicata is intended to do.

He should have put all of his cards on the table. In fact, I think that Mr. Kane believed he was putting all of his cards on the table because that's what he did. He filed a very comprehensive objection. He asserted a right to the opportunity that the debtor was proposing to take in the 9019 motion. That's what he was doing. He was objecting on the basis that he claimed his client had a superior right to this asset.

And he didn't -- like I said earlier, Your Honor, I don't think he would be permitted, I don't think these claims would fly today if no objection was filed. But the fact that there was renders, I think, indisputable that there was a finding on the merits, right. And the only reason that the Court didn't rule on Mr. Kane's motion, the only reason the Court didn't rule on it is because Mr. Kane withdrew it.

Is that really the way this process is supposed to work, that one can tell the Court that after a review of the

documents, I'm going to withdraw the objection and then file a claim for damages three months later with a different client, with a different control person, with a different lawyer? That's okay under doctrine of res judicata? I don't think so.

They had a full and fair opportunity. The fact that this was somehow -- you know, they're denigrating the fact that this was a 9019 motion. There's not supposed to be a mini-trial. Your Honor had discretion as to what to do. Every court in every bench trial has discretion as to what to do and whether or not to overrule objections and whether or not to substain [sic] objections. That's what judges to.

And there's nothing offensive about the fact that it happened in the context of a 9019 motion. They don't get to sit on their hands and wait to fight another day. If they believed that the debtor was exposing itself to liability, and that's what they actually say in the opposition, that's what I actually think they say in the complaint, accept it as true, they believe that the debtor created liability for itself by rendering -- by entering into this transaction.

Shouldn't they have raised their hand and said you can't do this deal, right? And the only response to that -- they have to that is they had no idea about value. Paragraph 127, Your Honor, Mr. Dondero, the architect of this complaint, as was proven on June 8th, knew very well about value. And it doesn't matter that it was only MGM. Your Honor commented on

that at the June 8th hearing in a different context. But everybody knows, right, it is. He sits on the board of MGM.

And I'm sorry if I called him a tippee instead of a tipper. But if this complaint goes forward, we'll dig into that real deep. But there's no reason it ought to, Your Honor. This case ought to be dismissed on res judicata grounds. It should be dismissed on judicial estoppel grounds. And it should be dismissed for all the reasons that I said in my argument in my brief.

But I do just want to close with one point, and that is to read from a case called Goldstein, which I think I alluded to earlier on this issue of whether there's a fiduciary duty that's owed by an advisor to an investor and a fund:

> "At best, it is counterintuitive to characterize the investors in a hedge fund as the clients of the advisors. The advisor owes fiduciary duties only to the fund, not to the fund's investors."

There's a lot of discussion about fiduciary duties, Your Honor. But to the extent that they have any basis to defeat the motion to dismiss on res judicata or collateral estoppel grounds, we hope and we trust and we know the Court will review the case law vigorously to test some of the assertions to that.

I have nothing further, Your Honor.

THE COURT: All right. Well, thank you to all of

you.

As a reminder, I don't think you need it, but as a reminder, I am essentially acting as a magistrate for Judge Boyle in this action. And whichever way I go on whichever theories, I think she would expect a thorough write-up. It would, of course, be in the form of a report and recommendation for her to either adopt or not if I dispose of some or all of the counts in the lawsuit.

Even to the extent I deny dismissal, even though the rule typically does not require a court to make detailed findings and conclusions in connection with a denial of a motion to dismiss, again, since I'm sitting as a magistrate, I think Judge Boyle would expect some thorough explanations and reasoning from me.

So that's my way of saying I'm taking this under advisement. I am going to drill down on some of the cases that have been argued. I think some important issues are raised here that need some thorough reasoning.

So I will do the best to get this out without too much delay. I think there's probably zero chance, zero chance I'm going to get it done by the end of the year. We're just too behind with some of our under-advisements. But I will try earnestly to get it out fairly soon after the first of the year. All right?

Thank you. You all have a good holiday.

THE CLERK: All rise.

(Proceedings concluded at 12:37 p.m.)

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C E R T I F I C A T I O N

We, DIPTI PATEL, KAREN WATSON, CRYSTAL THOMAS, AND PATTIE MITCHELL, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Dipti Patel
DIPTI PATEL, CET-997

/s/ Karen Watson
KAREN WATSON, CET-1039

/s/ Crystal Thomas
CRYSTAL THOMAS, CET-

/s/ Pattie Mitchell
PATTIE MITCHELL
LIBERTY TRANSCRIPTS DATE: November 23, 2021